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Supreme Court, U.S.
FILED
07-459 OCT 2 - 2007
OFFICE OF THE CLERK

(1)

No.

In The
Supreme Court of the United States

AARON FLINT, *Petitioner*,

v.

GEORGE DENNISON, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF MONTANA-MISSOULA; THE ASSOCIATED STUDENTS OF THE UNIVERSITY OF MONTANA; KYLE ENGELSON, IN HIS OFFICIAL CAPACITY AS THE ASUM ELECTIONS COMMITTEE CHAIR, ET AL, *Respondents*.

On Petition for Writ of Certiorari to the U. S. Court of Appeals for the Ninth Circuit

Petition for a Writ of Certiorari

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Questions Presented

(1) Whether, consistent with the First Amendment, the educational mission of a public university is sufficient to justify expenditure limits on privately-funded extracurricular political speech by candidates for student government.

(2) Whether a privately-funded election for student government at a public university is a "limited public forum," as defined in the Ninth Circuit, and whether, in this context, the state needs only to show a rational basis to justify content-based limitations on political speech.

Parties to the Proceedings

The following additional respondents were defendants in the District Court and appellants in the Court of Appeals:

Justin Baker, Averiel Wolff, Sophia Alvarez, Anna Green, Kris Monson, Derek Duncan, and Katie Boeckx, in their official capacities as Associated Students of the University of Montana's ("ASUM") Elections Committee Members, Gale Price, President; Vinnie Pavlish, Vice President; Cassie Morton, Business Manager and ex-officio members of the ASUM Senate; Jessica Adam, Bryce Bennet, Andrew Bissell, Brad Cederberg, Tyler Clairmont, Nezha Haddouch, Shawna Hagen, Chris Healow, Andrea Helling, Derf Johnson, Britta Padgham, Kimberly Pappas, Josh Peters, Rebecca Pettit, Jake Pipinich, Ross Prosperi, Jon Snodgrass, Leslie Venetz, Nathan Ziegler, and Casey Hogue, in their official capacities as ASUM Senators.

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Petition for a Writ of Certiorari

Petitioner respectfully requests a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this case.

Opinions Below

The order of the court of appeals denying rehearing and its judgment are unreported. 53a. Its opinion affirming the district court is reported at 488 F.3d 816. App. 1a. The district court opinion is reported at 361 F. Supp. 2d 1215. App. 40a.

Jurisdiction

The court of appeals denied Petitioner's rehearing petition on July 13, 2007. App. 53a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitution, Statutes & Regulations Involved

U.S. Const. Amend. I is in the Appendix at 54a. Relevant portions of the ASUM Constitution and Bylaws are in the Appendix at 54a-71a.

Statement of the Case

The overarching question presented by this case can be simply put: Can a public university limit student government candidate speech through expenditure limits? The Ninth Circuit approved a rule adopted by the University of Montana ("UM"), through its student government, limiting candidate campaign expenditures to only $100 on its 10,000 student Missoula campus. This holding is contrary to this Court's decisions in *Morse v. Frederick*, 127 S. Ct. 2618

(2007),[1] *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969), *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Randall v. Sorrell*, 126 S. Ct. 2479 (2006). Without considering UM's rule under these cases, the Ninth Circuit instead applied forum analysis and found the student government elections to be a "limited public forum," in contradiction to *Widmar v. Vincent*, 454 U.S. 263 (1981). The court below then applied rational basis scrutiny and found the educational mission of the university[2] justified the candidate campaign expenditure limits. In addition to being contrary to decision of this Court, the Ninth Circuit analysis conflicts with decisions of numerous other circuits.

Although the question raised by this case can be simply stated, the answer lies in an array of decisions of this Court, fraught with complexity in application, which have spawned confusion and conflict in the lower courts.

In light of this Court's holding in *White*, can the speech of a candidate ever be limited? Under *Randall*,

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[1]This Court decided *Morse* after the three judge panel handed down its decision in this case and the petition for rehearing en banc was filed. The Ninth Circuit, therefore, did not consider *Morse* in reaching its decision. This Court should grant certiorari, vacate the Ninth Circuit opinion and remand this case for reconsideration in light of *Morse*. In the alternative, this Court should grant certiorari and set the case for briefing on the merits.

[2]The district court deferred to UM's academic autonomy and found the limits reasonable in "ensur[ing] all students enjoy equal access to the educational benefits available through student elections and governance."App. 41a.

can expenditure limits on a candidate's campaign ever be justified? With regard to the school speech cases, does a public university's educational mission justify limitations on core political speech under the boundaries this Court set in *Morse*? Under *Tinker*, does the First Amendment protect a student's nondisruptive, privately-funded, extracurricular and independent political advocacy?

"[T]he courts of appeals have not applied a clear or consistent analytical model to school expression cases in the past two years. Rather the courts have relied on any of several doctrines or tests to guide their decisions, and the guidance from these tests has produced inconsistencies in the law." Susan Dente Ross, *Silenced Students: The Uncertain But Extensive Power of School Officials to Control Student Expression* 79 Journalism & Mass Comm. Q. 172, 182 (Spring 2002) [hereinafter *Silenced Students*].

Beyond these questions, the lower court's forum analysis raises even more questions and conflicts–does allowing a university student government election, where the campaign is conducted only in part on university property, establish a government forum? If it does, is it a "designated public forum" or a "limited public forum?" And what protection is afforded political speech in each? "As a result of the confusion among the categories, courts may classify the same or similar locations under different names, and because particular–if sometimes differing–standards of review are attached to these names, these courts may reach contrary results." Ronnie Fischer, *"What's in a Name?" An Attempt to Resolve the "Analytical Ambiguity" of the Designated and Limited Public Fora* 107 Dick. L. Rev. 639 (Winter 2003) [hereinafter *"What's in a Name?"*].

This case presents a unique opportunity for this

Court to provide guidance to the lower courts in areas of law fraught with confusion and conflict and, in so doing, ensure that First Amendment rights are consistently protected.

I. The Regulations

At the time of the election at issue in this case, ASUM Bylaws Article V § 2(G)(3) limited Aaron Flint's candidate campaign expenditures for the ASUM Senate to $100. App. 70a.[3] The maximum expenditure allowed for a President-Vice President team was $100 and for Business Manager $100. *Id.* The limits apply to a broad range of campaign activities, whether conducted on the university campus or not, including the public sidewalks and city streets of Missoula. Campaigning is defined as "any activity which directly or indirectly promotes the candidacy of one or more individuals for an office," including a candidate's personal appearances, the posting or publishing of advertisements, distribution of literature, lobbying voters, and the buying of votes with money, gifts, or alcohol. App. 68a-69a.[4]

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[3]Presently, with or without a primary election, the maximum expenditure for Senators is $75, for a President-Vice President team $150, and for Business Manager $75. ASUM Bylaws Art. V §2(H)(1-3) (2005) (available at http://www.umt.edu/asum/government/bylaws.htm#ArticleV).

[4]Since the filing of this suit, ASUM's definition of campaigning has been broadened:

> Campaigning, with the exception of primary petition signing, is defined as any activity which promotes the candidacy of one or more individuals for an office. This includes, but is not necessarily limited to, scheduling appearances, the buying of

The limits apply to candidates' spending their own money on their campaign, but do not apply to noncandidates and interest groups, who are also not limited, in practice, by the Bylaw's limits on placement of posters.[5] *See* App. 73a-74a.

II. The Facts

A. Background

1. ASUM's Government Functions

The Associated Students of the University of Montana is established as an agency of the state by University of Montana Bd. of Regents Policy 506.2, 506.3. All registered students are members and must pay the activity fee constituting the funds that the ASUM is charged with disbursing. App. 56a.

Every enrolled undergraduate student at UM with a minimum G.P.A. of 2.0 (in a 4.0 grading system) may run for and hold any elected office in ASUM. App. 55a. ASUM government's activities are ministerial and expressive, not academic. Students receive no grades for participation in ASUM government, and its President and Vice President are paid. ASUM elected leaders exert considerable influence on the campus community, shaping University decisions through

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votes with money, gifts, or alcohol, posting or publishing advertisements, *holding a charity event such as a concert, rally or other social gathering,* distributing literature, or lobbying a voter.

ASUM Bylaws Art. V § 2(A) (2005) (emphasis added) (available at http://www.umt.edu/asum/government/bylaws.htm#ArticleV).

[5] *See* App. 69a-70a (ASUM Bylaw limiting placement of campaign materials).

various boards, councils, and committees.[6] These bodies have general jurisdiction over ASUM rules governing student body conduct and are required to comply with applicable federal laws, the Board of Regents' policies, and the ASUM Bylaws.

2. ASUM's Expressive Functions

The ASUM lobbies the student body, the administration and the state legislature, advocating policy changes. *See* ASUM, *Current Legislation* (June 27, 2007) (available at http://www.umt.edu/asum/government/resolution.htm).

The Board on Member Organizations reviews all applications for groups and organizations applying for ASUM recognition and/or ASUM funding. Those meeting recognition requirements are forwarded to the ASUM Senate to be approved by a two-thirds (2/3) majority vote. App. 60a. In fiscal year 2004, the ASUM allocated approximately $500,000 in student activity

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[6]Committees and boards include the Relations and Affairs Committee, responsible for, inter alia, "recommending all changes to the ASUM Bylaws and ASUM Personnel Policy" and overseeing the functions of four ASUM executive agencies, App. 58a-59a; the Publications Board, which oversees all ASUM-funded publications, including the *Montana Kaimin* and *Cutbank* "without infringing on First Amendment rights," App. 64a; the University Center Board, which advises and oversees the University Center's policies, activities, and staffing, App. 65a-66a; and the Radio Board, which oversees the general operations of the student radio station, including all major format or structural changes and the student radio station budget. App. 67a.

fees,[7] which are public funds,[8] to over 150 student academic and honors organizations and ideological, political and social organizations.

Recognized groups use the funds to provide services for UM's 10,000 students and to advocate for or against University policies, fees, and hiring decisions, and state and national policy on a wide range of political and social issues from diverse viewpoints.[9] *See* ASUM, *Fiscal Policy* April 11, 2007) (available at http://www.umt.edu/asum/government/fiscal2.htm).

Furthermore, candidates' views and positions on ASUM's actions and policies are debated in support or opposition to their election to office. *See, e.g.*, App. 73a-76a; Aaron Flint, *Voter Guide* (Verified Amended Complaint, Exhibit 8 (Doc. # 1)); Sean Breslin, *Helling has Performed Admirably as ASUM President*, Montana Kaimin (July 18, 2007); Ashley Zuelky, Mike Gerrity, *Leftridge Wins Presidency*, Montana Kaimin (April 27, 2007).

B. The Events Leading to the Suit

Flint ran for a position on the ASUM Senate in the ASUM general election, held between April 27 and April 28, 2004, to determine the representative body of ASUM for the 2004-2005 academic year. Flint was qualified to run for the Senate in all respects.

During the elections, a large number of posters criticizing Flint as a "lapdog" of then-governor Judy

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[7] In fiscal year 2007, allocations were $775, 000.

[8] *See* 35 Op. of MT Att'y Gen. 74 (1974).

[9] For example, supported groups include Catholic Campus Ministry and the Muslim Student Association to the Students for Choice and the Students for Peace and Justice.

Martz were placed on the UM campus. *See* App. 76a. In some cases, two oversized posters were placed in a single classroom. *See* App. 74a. Flint believes that most, if not all, the posters were placed by leaders of the Montana Public Interest Research Group and the University of Montana College Democrats. *Id.* These organizations are not subject to the expenditure limits applicable to candidates. Flint believed that he had to compete with the ads "head to head" in order to make his views known. Flint spent a total of two hundred fourteen dollars and sixty nine cents ($214.69) on his campaign, including buying professionally done posters and providing pizza for campaign workers.

Thus, Flint spent more than the $100 allowed in order to respond to the third-party advocacy, and because he believed that the spending limit was unlawful, violating his First Amendment right to speak freely on political issues, including his candidacy for ASUM Senate. Flint won election to the ASUM Senate, however, the ASUM removed Flint from office for violating the spending limit. Flint seeks to expunge any records reflecting that he was charged with violating a ASUM Bylaw and thereby removed from Senate office.[10] *See* App. 9a-10a & n.3.

III. The History of the Litigation

On May 5, 2004, Flint filed his Verified Complaint for declaratory and injunctive relief, under the First and Fourteenth Amendments to the U.S. Constitution. He filed a motions for a temporary restraining order

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[10]The Ninth Circuit correctly found this case was not moot because Flint sought "sought an order requiring school officials to expunge from the school records all mention of the disciplinary action," App. 9a (quotation marks omitted), which amounted to prospective relief. App. 12a.

and preliminary injunction on the same date. On May 6, 2004, the district court denied Flint's motion for a temporary restraining order. Defendants filed a motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(1),12(b)(6) and 12(b)(7) on June 3, 2004.

On June 17, 2004, Flint filed an Amended Complaint, adding additional Defendants. On July 6, 2004, Defendants filed a motion to dismiss Flint's Amended Complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

After full briefing, a hearing on Flint's Motion for Preliminary Injunction was held on July 7, 2004, and on August 20, 2004, the district court denied the motion.

On September 8, 2004, the district court ordered the parties to submit filings as to why further briefing or argument was needed prior to resolution, or certifying that further briefing was unnecessary.

On October 8, 2004, the district court converted Defendants' Motion to Dismiss to a Motion for Summary Judgment under Fed. R. Civ. P. 56. Defendants' submitted supplemental materials in support of summary judgment, and on March 28, 2005, the court granted the motion. Judgment was issued on March 29, 2005, and Flint filed his Notice of Appeal on April 25, 2005.

The court of appeals affirmed the district court in an opinion filed June 1, 2007. A petition for rehearing en banc was filed on June 15, 2007, and the court denied it on July 13, 2007.

Reasons for Granting the Petition

I. This Case Involves a Matter of Great Public Importance Because Student Political Speech Is Seriously Jeopardized by the Ninth Circuit's Decision.

After the Ninth Circuit decided this case, this Court issued its opinion in *Morse*, 127 S. Ct. 2618. In *Morse*, this Court held that, under its school speech precedents, school authorities did not violate the First Amendment by restricting student speech at a high school event that was reasonably interpreted as advocating the use of illegal drugs. However, this Court noted that students' First Amendment rights are greatest with respect to their political and ideological speech. *Id.* at 2626 (citing *Tinker*, 393 U.S. 503).

The University of Montana justifies limiting student candidates' speech during student government elections as necessary "to prevent student government's being diverted by interests other than ones educational." App. 36a (internal quotations omitted). The Ninth Circuit agreed, reviewing the limits on student candidate speech under rational basis scrutiny and concluding that the expenditure limits "reasonably serve" UM's "pedagogical interests in educating student leaders at the University." App. 36a.[11]

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[11]The opinion defers to UM's self-defined educational interests throughout its analysis. *See* App. 17a (expenditure limits not subject to strict scrutiny because of "[t]he educational context of a university, the specific educational purpose of ASUM student government, and the numerous other limits placed upon student campaigning . . . ."); App. 28a (ASUM election a nonpublic forum because it "exists to allow campaigns for student office and to elect student representatives to ASUM leadership positions in order to

Holding limits on student candidate speech to only a reasonableness standard affords the barest protection to political and ideological advocacy. The Ninth Circuit ruling–sanctioning limits on students' political and social advocacy–is the paradigm of "abuse,"which concurring Justices Alito and Kennedy warned in *Morse* would follow deference to public schools' "educational missions":

> The "educational mission" of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.
>
> During the *Tinker* era, a public school could have defined its educational mission to include solidarity with our soldiers and their families and thus could have attempted to outlaw the wearing of black armbands on the ground that they undermined this mission. Alternatively, a school could have defined its educational mission to include the promotion of

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provide student candidates a valuable educational experience"); App. 35a-36a (spending limits are reasonable in light of the purpose of the elections because ASUM "has [always] been subject to [UM's] educational mission"; expenditure limits are "vital to maintain the character of ASUM and its election process as an educational tool, rather than an ordinary political exercise" and they "prevent student government's being diverted by interests other than ones educational." App. 36a (internal quotations omitted)).

> world peace and could have sought to ban the wearing of buttons expressing support for the troops on the ground that the buttons signified approval of war. *The "educational mission" argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment.*

Morse, 127 S. Ct. at 2637 (Alito & Kennedy, JJ., concurring) (emphasis added).

The Ninth Circuit's decision, therefore, conflicts with *Morse* in its treatment of student political speech[12] and its deference to a public school's educational mission, and it approves limits on political speech of startling breadth–limiting extracurricular candidate speech funded by the student himself, without regard to where it occurs, on campus or throughout the city of Missoula.

In determining that UM created a limited public

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[12]Justice Alito, joined by Justice Kennedy, conditioned his support of the opinion in *Morse* on the understanding that:

> a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it *provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue*, including speech on issues such as "the wisdom of the war on drugs or of legalizing marijuana for medicinal use."

Morse, 127 S. Ct. at 2636 (Alito & Kennedy, JJ., concurring) (emphasis added) (citation omitted).

forum by allowing student government elections, and in finding that the restrictions are reasonable in light of the purpose of the elections, the court below was deciding a case that lies at the intersection of three complex and confusing areas of First Amendment law: campaign finance, school speech, and public and nonpublic fora.

Do the facts that ASUM is student government and the speech to be limited "occur[s] mostly, if not exclusively, on a *university campus*," App. 17a, distinguish ASUM elections from other elections? Does this Court's protection for candidate speech in *Buckley*, *White*, and *Randall* apply? Or is this case governed by this Court's "school speech" precedents such as *Tinker* and *Morse*? *See Morse*, 127 S.Ct. at 2624 ("There is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents . . . .").

Or do these same facts mean that, under *Widmar*, the government has created a forum–the election is open to everyone's campaign speech, which takes place only partly on university property, but also on the public streets and sidewalks of the city in which the university resides? *See* App. 17a ("[T]he expenditures occurred mostly, if not exclusively, on a *university campus*.").

If not a spatial forum, is the election a "metaphysical" forum under *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830, (1995) or *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000) even though neither government speech or access to government funds is at issue? *See* App. 21a n.8 ("it is Flint's spending of his own money that was regulated, not University funds or subsidies to Flint.") Does *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) apply even though the

speech here is extracurricular and not sponsored in any way? *See* App. 21a n.8 ("We are presented in this case not with the speech of the University of Montana but with the speech of students involved in campaigning for student government.").

If the government has created a forum, is it a "designated public forum" or a "limited public forum"? What level of scrutiny is required under each? Or does the university's educational mission justify all limits on students' political speech, regardless of the type of forum created?

These are important questions. The characterization of the speech and its circumstances determines the analysis employed, and the analysis largely determines the level of protection afforded the students' speech.[13] Students' right to free speech on public university campuses should not depend on "classification game[s]" or semantics, and this Court should provide authoritative answers to these questions. *Gilles v. Blanchard*, 477 F.3d 466, 474 (7th Cir. 2007).[14]

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[13] *See, e.g., Canady v. Bossier Parish School Bd.*, 240 F.3d 437, 441-43 (5th Cir. 2001) ("The level of scrutiny applied to regulations of student expression depends on the substance of the message, the purpose of the regulation, and the manner in which the message is conveyed").

[14] "[S]chool expression case law has developed into a jumbled jurisprudence of labels, in which "inappropriate" expression may be quashed. . . . [T]his area of the law has become little more than "an elaborate, even byzantine scheme of constitutional [categories] . . . [that are] virtually impermeable to common sense." *Silenced Students*, *supra* 3, at 182 (citation omitted).

II. The Ninth Circuit's Ruling Conflicts with this Court's Treatment of Limits on Expenditures for Campaign Advocacy.

Little more than a year ago, in *Randall*, this Court reaffirmed that limits on expenditures for speech on behalf of a candidate's election are subject to strict scrutiny because they "necessarily reduce the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." 126 S. Ct. at 2488 (quotation marks and citation omitted). "Well- established precedent makes clear that . . . expenditure limits violate the First Amendment." *Id.* at 2485. The Ninth Circuit, however, held that "traditional First Amendment analysis" is applicable here and rejected the application of *Buckley* to the expenditure limits. App. 16a.

A. The Lower Court's Ruling Conflicts with this Courts' Precedents Universally Condemning Expenditure Limits.

The Ninth Circuit distinguished *Buckley* and *Randall* on the basis that the "election [was] to *student government* and . . . the expenditures occurred mostly, if not exclusively, on a *university campus.*" App. 17a (emphasis in original). The court admits that "ASUM undoubtedly has an impact on students at the University and has certain powers to distribute funds among student groups," *id.*, but found "several differences . . . between ASUM's elections and state and national political elections" that justified forgoing the strict scrutiny mandated by *Buckley* and *Randall.* App. 18a-19a n.7.[15]

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[15]The Ninth Circuit's decision abrogates *Welker v.*

The Ninth Circuit reasoned that the ASUM limits are not subject to the strict scrutiny universally applied to expenditure limits because:

> 1) ASUM's control is not as pervasive as government seated in the state capital;
> 2) the ASUM's sovereign power derives from the Board of Regents;
> 3) the University sees the ASUM primarily as an educational tool, as evidenced by the facts that:
>
> > a) a student must maintain at least a 2.0 grade point average to run for office; and
> > b) only students are allowed to vote in the election.

See App. 17a-19a.

The first point, if a valid consideration, leads to a curious result. If First Amendment rights vary with the "ubiquity" of government's power to control facets of citizens' lives, then it follows that the federal government, which has less presence in a UM student's life than does the ASUM, has greater leeway in regu-

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Cicerone, 174 F. Supp.2d 1055 (C.D. Ca. 2001), a case with nearly identical facts. The court in *Welker* noted that the university elections code "governs student elections at a state university" and that *Buckley* was applied to state elections, *id.* at 1064-65, and saw "no reason to distinguish between applying *Buckley* to state political elections and political elections at state universities." *Id.* at 1065. The court found inapposite the "generally relaxed First Amendment standard applicable to the college and university setting" because "an expenditure restriction does not implicate an institution's scarce resources,' relate to the school's curriculum, or tread on administrators' areas of expertise." *Id.* at 1065.

lating speech. Moreover, this Court noted in *White* with respect to elections to the judiciary that the First Amendment rationale supporting "unconstrained speech in elections for political office" applies where ever the elected candidates make or set aside law. 536 U.S. at 784. ASUM makes laws, including the one at issue here; it interprets and amends the ASUM Constitution, wields the power of the purse, and oversees and appoints members to Boards and Commissions that *do* control many facets of UM students' lives.

As to the source of ASUM's power, agencies are created by the legislature to execute and enforce regulations of speech in the federal government and in every state and ASUM is an agency of the state. Those agencies are no less government and their regulations are not deferentially reviewed simply because the agency is not the ultimate source of its authority.

This leaves the third argument, that the elections to ASUM and the ASUM are primarily educational in purpose and thus subject to UM's educational interests. Despite ASUM's lawmaking and executive functions, the Ninth Circuit explains that the elections are primarily educational, because *candidates* must have a "C" average and the *electorate* are UM students. *See* App. 17a.

Conditions of *candidacy* are not indicia of an educational purpose, as they are not unique to the university setting. Candidates for federal and state office must meet age, residency, and/or citizency requirements and state candidates must often meet petition signature requirements. Such requirements do not implicate the First Amendment and are supported by government's interest in conducting elections. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983).

The fact that the *electorate* is UM students does not establish a purpose for the elections, it simply restates that the elections take place at a university for a student government. And qualifications for *voting* are irrelevant in showing an educational purpose in limiting *candidates' speech*. Thus, qualifications for candidates and the electorate say nothing about *campaigns* for office to the ASUM, where core First Amendment speech is at issue, and

> the First Amendment does not permit [government] to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about. [T]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.

White, 536 U.S. at 788 (internal quotations and citations omitted).

B. The Challenged Regulations' Effect on Political and Social Advocacy Extends Beyond Speech Directed at a Candidate's Election.

There is no question that candidates' speech is at the core of the First Amendment's protection. *Buckley*, 424 U.S. at 14-15.[16] And limiting the debate surround

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[16] *See* App. 14a ("*Buckley* and its progeny . . . classify the student campaign expenditures as "speech" worthy of First Amendment protection."); App. 23a n.9 (" . . . the University

ing student government elections also has broad secondary First Amendment consequences.

The ASUM is the source and the gatekeeper of much of the expressive activities at UM and the interaction between the student body, the administration and the state legislature. The ASUM Senate and the Board on Member Organizations review all applications for groups and organizations seeking official recognition and student activity fee funding. Official recognition and funding allow these groups to provide services for UM's 10,000 students and fund advocacy by a wide range of ideologically diverse groups.

The elections are debates on these functions and issues as well as on candidates' qualifications for office, as candidates' views and positions on ASUM's actions and policies are discussed in support or opposition to their election to office. Moreover, election to the ASUM Senate brings a measure of control over the advocacy allowed on campus by the groups and organizations seeking recognition and student activity fee funding. The breadth of speech affected by the challenged regulations extends to the entire UM campus and beyond.[17]

. . . is *allowing* the campaign-related speech"; App. 35a (the limits "preserve the character" of "ASUM and its election process as an educational tool, rather than an ordinary political exercise"); App. 37a n.12 ("even . . . pure political speech" is subject to restriction in a limited public forum).

[17] As *Buckley* said:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression

III. The Decision Conflicts with this Court's Precedents Establishing Students' First Amendment Rights and with the Decisions of Other Circuits.

In *Morse*, this Court explained the proper balance between the First Amendment rights of students and the countervailing government interests. The relevant factors are: the nature of speech or activity at issue, 127 S. Ct. at 2626 (distinguishing *Tinker* from the case before it on the basis of the type of speech at issue), the relevant government interests, especially those flowing from the special characteristics of the school environment, *id.* at 2626-27 (explaining that the special characteristics of the high school context in which it occurred made the speech at issue in *Fraser* regulable), and the threat the speech poses to those interests. *Id.* at 2628 ("Student speech celebrating illegal drug use at a school event . . . poses a particular challenge for school officials working to protect those entrusted to

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> in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . ." "[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates. . . ." This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.

424 U.S. at 14-15 (citations omitted).

their care from the dangers of drug abuse.").

Public school students' First Amendment rights are greatest when they seek to engage in political and ideological speech. *Id.* at 2626 (citing *Tinker*, 393 U.S. at 519). Answering concerns that the decision could chill "national debate about a serious issue," this Court explained that, unlike black armbands worn by students to protest the war in Vietnam the speech at issue in *Morse*, the banner high student Joseph Frederick unfurled during a high school field trip, "BONG HiTS 4 JESUS," was "plainly not . . . political debate" and did not merit the protection afforded political speech. *Id.* at 2625.[18]

While students' First Amendment rights must be viewed in light of certain " special characteristics of the school environment,'" this Court reiterated in *Morse*

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[18] *See also id.* at 2626 ("The essential facts of *Tinker* are quite stark, implicating concerns at the heart of the First Amendment"); *id.* at 2627 n.2 (explaining that the holding in *Morse* does not conflict with *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. __ (2007), because Frederick's banner was not political speech and the setting in *Morse* was a public high school).

Elsewhere, this Court has explained that *Tinker* applies when the question is whether the school must *tolerate* students' speech as opposed to *promoting* it, *see Hazelwood*, 484 U.S. at 270-71, and other Circuit's have applied or denied the *Tinker* standard on this basis. *See, e.g. Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285 (10th Cir. 2004) ("student speech that happens to occur on the school premises,' such as the black armbands worn by the students in *Tinker* . . . [is] pure student expression that a school must tolerate unless it can reasonably forecast that the expression will lead to "substantial disruption of or material interference with school activities."'" (citations omitted)).

that political advocacy, even in this context, remains "at the core of what the First Amendment is designed to protect." *Id.* at 2626. And two concurring Justices warned against expanding deference to any educational or other interests beyond that already recognized in its precedents. *Id.* at 2637 (Alito & Kennedy, JJ., concurring).

Here, at issue is students' own political speech, and the characteristics of the public university environment *underscore* students' First Amendment interests. *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."). The political speech is not sponsored in any sense because it is not made possible by UM funds, UM does not approve or review it, and it is limited whether it happens to occur on university property or not. App. 23a n.9 (". . . the University is not sponsoring . . . any of the candidates' speech but is *allowing* the campaign-related speech"); App. 27a ("Flint challenges the limitations on speech within the confines of the ASUM election, whether the speech is delivered on campus or off . . . ."). Yet the Ninth Circuit applied the least rigorous standard of review and found UM's educational interests sufficient justification.

Other Circuits, however, have applied the *Tinker* standard in similar circumstances. *See Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 469 (6th Cir. 2000) (*Tinker* standard applies "to justify the prohibition of a particular expression of opinion"); *Chandler v. McMinnville School Dist.*, 978 F.2d 524, 529 (9th Cir.1992) (citations omitted) (". . . the standard for reviewing the suppression of vulgar, lewd, obscene, and

plainly offensive speech is governed by *Fraser*, school-sponsored speech by *Hazelwood*, and all other speech by *Tinker*); *Henerey v. City of St. Charles, School Dist.*, 200 F.3d 1128, 1132 (8th Cir. 1999) (parallel citations omitted):

> Purely individual speech by students constituting "personal expression that happens to occur on the school premises" is subject to a high degree of First Amendment protection. *Hazelwood*, 484 U .S. at 271. However, school officials may restrict even individual student expression that "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school," or that "would substantially interfere with the work of the school or impinge upon the rights of other students." *Tinker*, 393 U.S. at 509 (citations and internal quotation marks omitted).

A. The Ninth Circuit's Decision Conflicts with the Analysis of the Only Other Circuit That Has Addressed Restrictions on Public University Student Government Candidates' Campaign Speech.

The Ninth Circuit's ruling specifically requires forum analysis when limits on university student candidates' campaign speech are reviewed, which conflicts in principle with the Eleventh Circuit.

In *Alabama Student Party v. Student Gov't Ass'n of the University of Alabama*, 867 F.2d 1344 (11th Cir. 1989), the Eleventh Circuit expressly eschewed forum analysis when presented with restrictions on student candidate campaigns. The Eleventh Circuit applied a

"reasonableness" standard it gleaned from this Court's school speech precedents, not from its public forum precedents. *Id.* at 1346-47.[19]

Highlighting the confusion in this area, the dissent argued that the district court had been correct in analyzing the restrictions as in a forum, *id.* at 1349-50 (Tjoflat, J., dissenting), and also pointed out a problem with analyzing student government candidate speech as a forum that the Ninth Circuit did not consider.[20] He noted that limits on student government campaigns inevitably cross into traditional on-campus public fora. *Id.* at1354 n. 6 (Tjoflat, J., dissenting). As the Fifth Circuit has similarly noted, even if the limits applied only to on-campus speech,

> [a] modern university contains a variety of fora. Its facilities may include private offices, classrooms, laboratories, academic medical centers, concert halls, large sports stadiums

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[19]The standard usually attributed to *Hazelwood* is that the restriction must be "reasonably related to a legitimate pedagogical interest." *Hazelwood*, 484 U.S. at 273. It is not clear whether this is the standard applied in *Alabama Student Party*, or whether it is less strict than the "reasonableness" standard applied here, since the Ninth Circuit distinguished its standard from that of *Hazelwood* and *Alabama Student Party*. App. 22a n.9, 19a.

[20]The dissent also illustrates the confusion among the Circuits as to what constitutes a designated public forum, a limited public forum, and the scrutiny applied in each. *Id.* at 1353 ("the district court determined that the campus fell within the limited public forum' category of government property. I would agree. I conclude, however, that the district court erred in its application of the constitutional standard governing this type of forum."). *See supra* 25-31.

> and arenas, and open spaces. . . . Its open spaces. . . come in a number of different types. Some are enclosed quadrangles bordered on all sides by university buildings and traversed by sidewalks, while others are grassy areas or plazas on the edge of campus where the University's grounds abut the city property. Thus, labeling the campus as one single type of forum is an impossible, futile task.

Bowman v. White, 444 F.3d 967, 976-77 (5th Cir. 2006). Here, the limits apply to both on- and off-campus traditional public fora, facts that the Ninth Circuit's forum analysis did not consider.

IV. The Ninth Circuit's Decision Conflicts with That of Other Circuits as to Whether Forum Analysis Is a Necessary Precursor to Application of this Court's School Speech Precedents.

Is forum analysis a necessary precursor to the school speech precedents, as the Ninth Circuit held? *See* App. 23a n.9. The Circuits are split. *Compare, e.g., Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (en banc) (analyzing content-based restrictions of a college student newspaper as a forum and explaining that educational interests noted in *Hazelwood*, 484 U.S. 260, apply in the college setting as to the reasonableness of the challenged regulation) *with Kincaid v. Gibson*, 236 F.3d 342, 348 n.6 (6th Cir. 2001) (en banc) (applying forum doctrine in a similar situation but explaining that doing so "has no bearing on the question of whether and the extent to which a public university may alter the content of a student newspaper," noting "that a college yearbook . . . might be analyzed under a framework other than the forum

framework," and citing cases from the Eighth, Fifth, and Fourth Circuits, and the District of Massachusetts analyzing incursions on students' First Amendment rights under various doctrines without employing forum analysis) *and with Vanderhurst v. Colo. Mountain Coll. Dist.*, 208 F.3d 908, 915 (10th Cir. 2000) (applying the *Hazelwood* standard to regulation of a professor's comments without analyzing whether they were made in a public or non-public forum). Does its application hinge on whether the speech occurs on campus? *See Porter v. Ascension Parish School Bd.*, 393 F.3d 608, 615 n. 22 (5th Cir. 2004) (collecting cases providing different answers to this question). Or is the age of the student or the level of school dispositive? *Compare, e.g., Student Gov't Ass'n v. Bd. of Trustees of the Univ. of Mass.* 868 F.2d 473, 480 n.6 (1st Cir. 1989) *with Hosty*, 412 F.3d 731.

V. The Ninth Circuit's Determination That the ASUM Elections Are a Limited Public Forum Conflicts in Principle with this Court's Precedents and the Decisions of Other Circuits.

The Ninth Circuit found the ASUM elections were not a designated public forum, in which strict scrutiny would apply, because "... the ASUM election provides for the selection of students to govern student affairs; the election does not provide University installations *for outsiders to showcase ideas in general.*" App. 28a (emphasis added). *See also id.* ("[The] Bylaws certainly do not permit students or the *general public* to use the ASUM election system *indiscriminately.*" (emphasis added)).

But this Court has explained that a designated public forum, in which strict scrutiny applies, is

created when "government . . . intend[s] to make the property *"generally available' to a class of speakers."* *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998) (*"AETC"*) (citation omitted). Using the facts in *Widmar* as an illustration, the Court in *AETC* explained that there, the Court found that the university had created a designated public forum for registered student groups by implementing a policy that expressly made its meeting facilities "generally open' *to such groups."* *Id.* at 679 (emphasis added) (citation omitted).[21]

Here, the Ninth Circuit denied UM had created a designated public forum, because it found the elections were not generally open, in terms of *both* participants and expression. *See* App. 28a-29a n.11 (reading *Widmar* and *Perry* to require general access in both categories to create a designated public forum).

The election is generally open to all students who meet the qualifications to run and *anyone* could express their views on who should be elected and why. The lower court's distinction between the ASUM elections and the forum in *Widmar* is a false one. *See* App. 28a-29a n.11. The forum is generally open as to *participants* in the same way the facilities were open to student groups and organizations in *Widmar*, yet the lower court denied that the elections were a designated public forum in which restrictions are subject to strict scrutiny.

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[21] *See also Perry Education Association v. Perry Local Educators' Assoc.*, 460 U.S. 37, 45-46 & n.7 (1983) (designated public fora as created when government opened a place or channel of communication for the public at large, including for use "by certain groups, *e. g.*, *Widmar* (student groups), or for the discussion of certain subjects.").

Moreover, UM's limits on *expression* during the elections do not make them into limited public fora. First, the Ninth Circuit "bootstrapped" the expenditure limits (and the purported educational benefits thereof) into the question of whether UM had opened only a limited public forum. *See* App. 27a n.10. And apart from the expenditure limits themselves, the only limits on expression imposed on participants are content-based restrictions on the time, place and manner of campaigning. App. 30a-31a. Such restrictions are evaluated in light of the type of any forum in which they occur, and not vice versus. *See Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51 (1981) (considering whether Minnesota had created a public forum in evaluating the constitutionality of what it claimed were valid time, place or manner restrictions).

Like the bootstrapping noted above, to consider content-based restrictions on expression in determining the type of forum created is to employ circular reasoning: government creates a limited public forum when it limits expression in a way the permissibility of which depends on the type of forum the government has created. This analysis conflicts with *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 547 (2001) (government cannot "recast a condition on funding [for speech] as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.").[22]

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[22]This approach also conflicts with that taken in other cases in the Ninth Circuit. *See Hills v. Scottsdale Unified School Dist.*, 329 F.3d 1044, 1049-50 (9th Cir. 2003) ("In making a forum type determination, it is important to separate the question of the propriety of the exclusion . . .

A. The Ninth Circuit's Determination That Student Government Elections Are Limited Public Fora Conflicts with the Analysis of Other Circuits.

The Ninth Circuit found that a limited public forum is a species of nonpublic forum in which limits on speech were constitutional, if they are viewpoint neutral and reasonable in light of the educational purposes of the forum. App. 31a-32a; 35a-36a. But Circuits differ in how they determine the type of forum at issue and whether a limited public forum is a nonpublic or public forum. This determination determines the level of scrutiny: regulation in a public forum must survive strict scrutiny, while regulation in a nonpublic forum is deferentially reviewed.

This has led to confusing results among the Circuits.[23] As the Ninth Circuit itself has explained:

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from the meaning of the exclusion in terms of the intent and scope of the forum.");

[23] *See generally, "What's in a Name?" supra* 3 (noting that the First, Third, Sixth, Eighth, Eleventh and D.C. Circuits have held that the limited public forum is either the same as or a subset of the designated public forum and that regulation in both is subject to strict scrutiny; the Second, Fifth, Seventh and Ninth Circuits say the limited public forum is either a designated or nonpublic forum but apply only rational basis review to regulation; the Tenth Circuit finds that limited public fora have been located in both designated and nonpublic fora and that strict scrutiny applies in limited-designate public fora and the reasonableness standard in nonpublic- limited public fora; the Second and Fourth Circuits have held that limited public fora are designated public fora, and made the standard of scrutiny dependent upon whether the speaker falls within the class

> The designated public forum has been the source of much confusion. As this court has put it, with considerable understatement, "The contours of the terms designated public forum' and limited public forum' have not always been clear." Some courts and commentators refer to a "designated public forum" as a "limited public forum" and use the terms interchangeably. But they are not the same, at least not in this circuit. Rather, a limited public forum is a sub-category of a designated public forum that "refers to a type of non-public forum that the government has intentionally opened to certain groups or to certain topics." "In a limited public forum, restrictions that are viewpoint neutral and reasonable in light of the purpose served by the forum are permissible."
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> n8 This categorization admittedly leads to the strange semantic result that a limited public forum is not actually a public forum. Therefore, in our analysis here, when we refer to a "public forum " (where strict scrutiny applies), we are referring to a designated

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established by the government: if the excluded speaker falls within the class to which a limited public fora has been made generally available, the class is treated as a traditional public forum, and strict scrutiny applies; these Circuits apply an "external standard" in reviewing the government's ability to designate the class, subjecting the designation to only rational basis review.).

> public forum (where strict scrutiny applies), but not to a limited public forum (where the reasonableness test applies).

Hopper v. City of Pasco, 241 F.3d 1067, 1074-75 (9th Cir. 2001) (footnotes in first paragraph omitted, citations omitted throughout).

The Sixth Circuit describes its view of the situation:

> These are the three categories of fora presently recognized in this circuit. We note, however, that there has been some uncertainty among the circuits as to whether there are one or two categories of fora other than "public" and "nonpublic," and what protection is due to these categories. Some courts have analyzed separate categories of "designated" and "limited" public fora, while others have found only one other category. *See, e.g., The Good News Club v. Milford Centr. Sch.*, 202 F.3d 502, 508-09 (2d Cir. 2000) (drawing no distinction between designated and limited public fora, and stating that restrictions on these limited public fora must be "reasonable and viewpoint neutral"); *Whiteland Woods, L.P. v. Township of W. Whiteland*, 193 F.3d 177, 182 n. 2 (3d Cir.1999) (stating that the designated forum is a nontraditional forum opened for "public discourse," but that the Court has also "discussed limited' public fora, which are designated for expression, but only on limited topics," and choosing to treat both categories under the stricter standards for designated public fora); *Warren v. Fairfax County*, 196

> F.3d 186, 193-94 (4th Cir.1999) (en banc) (treating designated and limited public fora as the same category, and setting up two standards for this forum-an "internal" standard, which gives strict scrutiny protection for the class of speakers to whom the forum was opened and an "external" standard, which "places restrictions on the government's ability to designate the class for whose especial benefit the forum has been opened"); *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 964-65 (9th Cir.1999) (distinguishing between a designated public forum, which is a nontraditional forum intentionally opened for public discourse that receives the same First Amendment protection as a traditional public forum, and a limited public forum, which is "a type of nonpublic forum that the government intentionally has opened to certain groups or to certain topics," but noting that the contours of these fora have not been clearly defined by the Court).

Putnam Pit, Inc. v. City of Cookeville, Tenn., 221 F.3d 834, 842 (6th Cir. 2000).

And the Ninth Circuit's bootstrapping the challenged restriction into the question of the type of forum, noted above, conflicts with the Second and Third Circuit's forum analysis. *See New York Magazine v. Metropolitan Transp. Authority* 136 F.3d 123, 129 - 130 (2d Cir. 1998) ("This reasoning would allow every designated public forum to be converted into a nonpublic forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content."); *Christ's Bride Ministries, Inc. v. Southeastern Pennsyl-*

vania Transp. Authority 148 F.3d 242, 251 (3d Cir. 1998) ("'standards for inclusion and exclusion' in a limited public forum must be unambiguous and definite' if the concept of a designated open forum is to retain any vitality whatever.'" (citation omitted)).

Elections to university student government are political debates with far-reaching consequences for expression at universities and society in general. If they are fora, it is imperative that they be uniformly treated among the Circuits.

VI. The Ninth Circuit's Determination That Student Candidate Expenditure Limits Are Justified by the University's Educational Mission Is Irrational.

The Ninth Circuit concludes that the expenditure limits further UM's pedagogical interests by "requir[ing] student candidates to focus on desirable qualities such as . . . answering questions face-to-face with one's potential constituents. . . . forc[ing them] to campaign personally . . . ." App. 36a. This is not a legitimate educational interest. UM has no educational interest in seeing candidates spend more time campaigning one way rather than another as opposed to spending less time campaigning and more at their studies. [24] Moreover, UM prohibits the very thing at which it claims the limits are aimed. "No door-to-door campaigning is permitted in the residence halls or family housing. Campaigning is permitted elsewhere

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[24] And, outside the educational context, as affirmed in *Randall*, expenditure limits are not justified by any government interest in "protect[ing] candidates from spending too much time raising money rather than devoting that time to campaigning among ordinary voters." *Randall*, 127 S. Ct. at 2489.

on campus, including the Lodge and classrooms with permission of the professor." App. 69a.

At bottom, the court's rationale for rejecting strict scrutiny and affording political speech the barest of First Amendment protection is based on its deference to the university's broad view of its educational mission, and the decision fails to adequately connect the limits with any legitimate educational interest.

Conclusion

The lower court did not consider this Court's decision or rationale in *Morse*, which casts doubt on its treatment of student candidate speech. This Court should grant Flint's petition and vacate the Ninth Circuit's decision and remand the case for reconsideration in light of *Morse* or, in the alternative, this Court should grant certiorari and set the case for briefing on the merits.

Respectfully submitted,

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United States Court of Appeals,Ninth Circuit.
Aaron FLINT, Plaintiff-Appellant,
v.
George DENNISON, in his official capacity as President of the University of Montana-Missoula (UMT); Associated Students of the University of Montana (ASUM); Kyle Engelson, in his official capacity as the ASUM Elections Committee Chair; Justin Baker; Averiel Wolff; Sophia Alvarez; Anna Green; Kris Monson; Derek Duncan; Katie Boeckx, in their official capacities as Elections Commissioners for the Associated Students of UMT; Jessica Adam, Defendants-Appellees,
andGale Price, President; Vinnie Pavlish, ASUM Vice President; Cassie Morton, ASUM Business Manager, and ex-officio member of ASUM Senate; Bryce Bennett; Andrew Bissell; Brad Cederberg; Tyler Clairmont; Nezha Haddouch; Shawana Hagen; Chris Healow; Andrea Helling; Derf Johnson; Britta Padgham; Kimberly Pappas; Josh Peters; Rebecca Pettit; Jake Pipinich; Ross Properi; Jon Snodgrass; Leslie Venetz; Nathan Ziegler; Casey Hogue, in their official capacities as ASUM Senators, Defendant.
No. 05-35441.

Argued and Submitted Feb. 5, 2007.
Filed June 1, 2007.

I.

A.

The University of Montana is a public university under the Montana Constitution; it is administered through a Board of Regents. Mont. Const. art. X, § 2. The Board of Regents requires that the University's student government organization meet certain requirements. For instance, the student government must follow all Board policies, and the student government's constitution must be approved by the president of the University.

ASUM is the student government at the University of Montana. ASUM is a "representative body of the members of the Association, organized exclusively for educational and non-profit purposes." ASUM Const. art. 2, § 1, *available at* http:// www. umt. edu/ asum/ government/ constitution. htm. Under its constitution, ASUM's "primary ***821** responsibility ... is to serve as an advocate for the general welfare of the students." *Id.* ASUM "government and activities" must "comply with Montana State law and the policies of the Montana Board of Regents on Higher Education." *Id.* § 4. All students at the University registered for seven or more credits during the Fall and Spring semesters are assessed an activity fee, and each student who pays this fee is a member of ASUM. *Id.* art. 1, § 2.

ASUM not only serves to represent the students at the University but also provides hands-on, practical educational opportunities for University students. As explained by ASUM's senior faculty advisor,

ASUM offers students experience in many forms of leadership, through which they develop a variety of skills to handle the responsibilities that arise in student government. ASUM senators and executives learn how to address conflicting interests of diverse constituencies, how to make recommendations about the allocation of budgetary resources, how to negotiate with administrators over matters such as tuition and fee increases, and how to draft policies and priorities for numerous student programs.

Since ASUM's inception in 1906, the University has viewed ASUM as an invaluable educational tool for students of the University. ASUM exists, according to its senior faculty advisor, for "essentially educational purposes."

Consistent with its goals of representing the students at the University and providing students with leadership opportunities, ASUM allows for the election of three student executives and twenty student senators. ASUM Const. art. 4, § 1(a) Article 7 of the ASUM Constitution and Article 4 of the ASUM Bylaws impose several procedures and restrictions on the student election process. For example, only ASUM members, i.e., Student Activity Fee-paying students of the University, who maintain at least a 2.0 cumulative grade point average are eligible to run for elected office. *Id.* art. 7, § 1. Students must be registered for at least one credit to vote in any ASUM election. *Id.*

The ASUM Bylaws broadly regulate campaigning, which is defined as "any activity which directly or indirectly promotes the candidacy of one or more individuals for office." ASUM Bylaws art. V, § 2.A,

available at http:// www. umt. edu/ asum/ government/ bylaws. htm. The Bylaws provide that on campus campaign materials may be displayed only after the official campaigning period begins and only in certain areas. *Id.* §§ 2.B-C, 2.F.2-4. The Bylaws further prohibit any door-to-door campaigning in University residence halls or family housing and condition campaigning in a classroom on the permission of the professor. *Id.* § 2.E.

At issue in the case at bar is the Bylaws' campaign expenditure limitation: $100 for individual candidates for office. *Id.* § 2.G.1-3. The Bylaws require each student candidate to document and make public his expenditures two days prior to the general election. *Id.* § 2.H. ASUM reimburses candidates for a portion of their expenditures. *Id.* § 2.G.4. The Bylaws prescribe that all contributions to campaigns come from students; corporate and political action committee contributions are prohibited, as are contributions from ASUM-sponsored organizations. *Id.* § 2.G.5, I. As a means of enforcing these campaign regulations, the Bylaws provide that any candidate who violates the election rules may be barred from candidacy or denied office. *822

B.

With this general background in place, we turn to the facts of this case. Flint ran for and won election on a joint ticket with Gale Price as ASUM President and Vice-President, respectively, for the 2003-2004 academic year. Flint and Price combined to spend about $300 on their campaign and failed fully to disclose

these expenditures as required by the ASUM Bylaws. The ASUM Senate censured both Flint and Price for exceeding the campaign expenditure limit but allowed them to retain their offices as ASUM President and Vice-President.

The following year, Flint ran for a term as ASUM Senator and again exceeded ASUM's spending limit. Upon submitting his campaign expenditure form on April 26, 2004, in which Flint reported expenditures of $214.69, Flint was informed by ASUM Elections Chairman Kyle Engelson that Flint's name would be removed from the ballot for the upcoming election. Flint, then ASUM President, responded to Engelson's letter with an email in which he noted ASUM procedures require a two-thirds vote of the Senate approving Engelson's recommendation, which would not be possible until the election was already underway. Flint suggested that Engelson recommend to the Senate that candidates who violated ASUM election laws not be allowed to take office. After the election was underway, the ASUM Senate voted to remove Flint from his Senate seat should he win. Accordingly, after Flint received enough votes to be elected ASUM Senator, he was denied office.

Flint filed a complaint in United States District Court on May 5, 2004, under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution, claiming that the ASUM Bylaws's $100 spending cap on campaign expenditures was an unconstitutional abridgment of free speech. Flint sued George Dennison, in his official capacity as the University president; ASUM; Kyle Engelson, in his official capacity as ASUM Elections Committee Chair; and

seven ASUM Elections Committee Members in their official capacities. Flint later filed an amended verified complaint adding Gale Price, then ASUM President, two ASUM Executive Officers in their official capacities, and twenty ASUM Senators in their official capacities (collectively referred to hereinafter as "defendants").

Flint also filed a motion for a temporary restraining order, a motion for a preliminary injunction, and a motion to consolidate the preliminary injunction hearing with the trial on the merits. The district court denied Flint's motions. Before the court rendered its judgment as to Flint's motion for preliminary injunction, defendants filed a motion to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1), 12(b)(6) and 12(b)(7). Following the court's denial of a preliminary injunction, Flint then filed an amended verified complaint to which the defendants again filed a 12(b)(1) and 12(b)(6) motion to dismiss. Thereupon, the district court issued an order to show cause regarding additional briefing and argument. Flint requested further briefing and argument to resolve the issue as to whether strict scrutiny [FN1] or rational relationship [FN2] applied to test the constitutionality ***823** of the campaign expenditure limitations. Defendants responded that additional briefing or argument was not needed and suggested that if the court chose to refer to matters outside the pleadings to resolve the 12(b) motion, the court should convert it to a Rule 56 motion for summary judgment based on the record developed in connection with the motion for preliminary injunction. The district court accepted defendants' suggestion and, applying a rational relationship standard to the spending cap, issued an order and opinion granting

summary judgment to defendants on March 28, 2005.

> FN1. Under a strict scrutiny analysis, government is required to show that its regulation of speech "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)
>
> FN2. Under a rational relationship analysis, government may regulate speech "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 46, 103 S.Ct. 948.

Flint timely appealed that order. He claims that the district court applied the wrong legal standard in determining the constitutionality of ASUM's regulations. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

II.

Before turning to the merits of Flint's appeal, we first consider two threshold issues: whether Flint's claims are moot as a result of Flint's graduation from the University of Montana and whether the Eleventh Amendment immunizes defendants from Flint's suit.

A.

["Article III of the Constitution limits federal-court jurisdiction to Cases' and Controversies.'" *Massachusetts v. EPA*, ---U.S. ----, 127 S.Ct. 1438, 1452, 167 L.Ed.2d 248 (2007); *see also DaimlerChrysler Corp. v. Cuno*, --- U.S. ----, 126 S.Ct. 1854, 1860-61, 164 L.Ed.2d 589 (2006) ("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing 6633 so."). A case that "has lost its character as a present, live controversy" is moot and no longer presents a case or controversy amenable to federal court adjudication. *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir.1997); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (explaining that the mootness doctrine derives from the requirement of an Article III case or controversy). A cause of action is moot when the issues " are no longer "live" or the parties lack a legally cognizable interest in the outcome' " of the litigation. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (quoting *County of L.A. v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979)). Mootness, however, is a flexible justiciability doctrine that allows review "if there are present effects that are legally significant." *Jacobus v. Alaska*, 338 F.3d 1095, 1104 (9th Cir.2003); *see also U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 400, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980) (explaining that the Court's "cases demonstrate the flexible character of the Art. III mootness doctrine"). Where a court retains the ability to " fashion some form of meaningful relief " between the parties, an appeal is not moot, and the court retains jurisdiction. *Dream Palace v. County of Maricopa*, 384 F.3d 990, 1000 (9th Cir.2004) (quoting

In re Pattullo, 271 F.3d 898, 901 (9th Cir.2001) (order)).

Here, although Flint filed his lawsuit prior to his graduation, we must consider whether Flint's 2004 graduation from the University of Montana renders his cause of action seeking declaratory and injunctive relief against defendants moot. *See* ***824** *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, --- U.S. ----, 127 S.Ct. 1484, 167 L.Ed.2d 225 (2007); *Clark v. City of Lakewood,* 259 F.3d 996, 1006 (9th Cir.2001) ("Mootness inquiries . . . require courts to look to changing circumstances that arise after the complaint is filed. . . ."). Generally, once a student graduates, he no longer has a live case or controversy justifying declaratory and injunctive relief against a school's action or policy, and his case is therefore moot. *See Doe v. Madison Sch. Dist. No. 321,* 177 F.3d 789, 798 (9th Cir.1999) (en banc). When a student's record contains negative information derived from allegedly unconstitutional school regulations, however, that information may jeopardize the student's future employment or college career. *Hatter v. L.A. City High Sch. Dist.*, 452 F.2d 673, 674 (9th Cir.1971). So long as a former student's record contains evidence of disciplinary sanctions, and the former student seeks "an order requiring school officials to expunge from school records all mention of the disciplinary action," the action is not moot. *Id.*

Here, Flint's amended complaint sought such an order of expungement. Flint sued for (1) a declaration that ASUM's limitation on campaign expenditures violated his free speech rights, (2) an injunction preventing ASUM from removing him from his elected position on

the ASUM Senate, and (3) an injunction ordering ASUM to remove from his record "all findings, proceedings, recommendations, and actions taken as a result of" the election code violations. Consequently, despite Flint's graduation from the University in 2004, his controversy remains "live" because of his third claim for relief. Given that mootness, unlike standing, is a flexible justiciability doctrine, *see Jacobus,* 338 F.3d at 1104, we retain the ability to grant relief in a legally significant way-to wit, ordering the expungement from Flint's record all evidence of his 2003 censure and the 2004 denial of his ASUM Senate seat. Such expungement is certainly a " form of meaningful relief.' " *Dream Palace,* 384 F.3d at 1000 (quoting *Pattullo,* 271 F.3d at 901).If we were to determine that Flint's First Amendment rights were violated, declaratory relief would require the University to expunge any and all records of Flint's censure and Senate seat denial; therefore, we hold that Flint's case is not rendered moot by his graduation.[FN3]

FN3. This case is distinguishable from *Students for a Conservative America v. Greenwood,* 378 F.3d 1129 (9th Cir.2004). There, we found the expungement exception inapplicable despite the students' request for expungement because the university did not keep records of election code violations. *Id.* at 1131. There was also no evidence in that case that the students were censured. In contrast, Flint was censured by ASUM, a school organization, in 2003 and denied his Senate seat in 2004 as is memorialized in ASUM Senate Meeting Minutes of April 28, 2004. Further evidence includes correspon-

dence memorializing Flint's violation of the spending limit in 2004 from Kyle Engelson on behalf of the ASUM Senate. Furthermore, neither in its briefing nor during oral argument has the University rebutted Flint's assertion that it keeps records of Flint's 2003 censure and 2004 Senate seat denial.

B.

Having determined that Flint's claims are not moot, we now consider whether defendants are entitled to immunity under the Eleventh Amendment. The Eleventh Amendment limits § 1983 claims such as Flint's. In *Will v. Michigan Department of State Police*, 491 U.S. 58, 70, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), the Supreme Court held that "States or governmental entities that are considered arms of the State' for Eleventh Amendment purposes" are not "persons" under § 1983. Moreover, *Will* clarified that "a ***825** suit against a state official in his or her official capacity .... is no different from a suit against the State itself." *Id.* at 71, 109 S.Ct. 2304. We have held that a state university is an arm of the state entitled to Eleventh Amendment immunity. *See, e.g., Armstrong v. Meyers*, 964 F.2d 948, 949-50 (9th Cir.1992) (per curiam). Therefore, state officials sued in their official capacities, including university officials, are not "persons" within the meaning of § 1983 and are therefore generally entitled to Eleventh Amendment immunity.

Will recognized one vital exception to this general rule: When sued for prospective injunctive relief, a state official in his official capacity *is* considered a "person" for § 1983 purposes. *Will*, 491 U.S. at 71 n. 10, 109

S.Ct. 2304 ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official-capacity actions for prospective relief are not treated as actions against the State.' " (quoting *Kentucky v. Graham,* 473 U.S. 159, 167 n. 14, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985))). This exception recognizes the doctrine of *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), that a suit for prospective injunctive relief provides a narrow, but well-established, exception to Eleventh Amendment immunity. *See Rounds v. Or. State Bd. of Higher Educ.,* 166 F.3d 1032, 1036 (9th Cir.1999) ("*Ex Parte Young* provided a narrow exception to Eleventh Amendment immunity for certain suits seeking declaratory and injunctive relief against unconstitutional actions taken by state officers in their official capacities."); *Doe v. Lawrence Livermore Nat'l Lab.,* 131 F.3d 836, 840 (9th Cir.1997) ("[T]he Eleventh Amendment allows only prospective injunctive relief to prevent an ongoing violation of federal law.").

Flint seeks declaratory and injunctive relief as related to past violations, namely, ASUM's allegedly unconstitutional infringement of his right to freedom of speech. However, as in *Doe v. Lawrence Livermore National Laboratory,* the relief Flint seeks is not so limited. In *Doe,* a contract university employee sought damages and reinstatement for breach of contract and a § 1983 violation after an alleged wrongful discharge. *Id.* at 837. The district court dismissed both claims as barred by the Eleventh Amendment, but we reversed the dismissal of the § 1983 claim, holding that reinstatement constitutes prospective injunctive relief because a wrongful discharge is a continuing violation. *Id.* at 841. Here, the injunctions Flint seeks as related to past

violations serve to expunge from University records the 2003 censure and 2004 denial of his Senate seat, which actions may cause Flint harm. Thus, the injunctions sought are not limited merely to past violations: they serve the purpose of preventing present and future harm to Flint. Therefore, they cannot be characterized solely as retroactive injunctive relief and are not barred by the Eleventh Amendment.[FN4]

> FN4. Because we ultimately hold that ASUM's campaign expenditure limitations do not violate the First Amendment and therefore affirm the district court's grant of summary judgment to all defendants, we need not consider defendants' argument that the student defendants are not state actors.

III.

Satisfied that this case presents a live legal controversy and that the Eleventh Amendment does not bar Flint's suit against defendants, we turn to the merits of Flint's claims. Because Flint appeals from the district court's order granting summary judgment in favor of defendants, we review de novo, viewing the facts in a ***826** light most favorable to Flint and drawing all reasonable inferences in his favor. *Scheuring v. Traylor Bros.*, 476 F.3d 781, 784 (9th Cir.2007). Because neither party disputes the relevant facts, our analysis is focused on application of the correct legal principles to the facts before us. *Arakaki v. Hawaii*, 314 F.3d 1091, 1094 (9th Cir.2002).

A.

The "speech" at issue in this case takes the form of a student candidate's spending during the election cycle for ASUM office. Because campaign expenditures implicate a student candidate's ability to convey his or her message to the University student body, the expenditures necessarily constitute "speech" and thus qualify for First Amendment protection. *See Austin v. Mich. Chamber of Commerce,* 494 U.S. 652, 657, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990) ("Certainly, the use of funds to support a political candidate is speech'...."); *Buckley v. Valeo,* 424 U.S. 1, 19-20, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam). There is no dispute in this case that *Buckley* and its progeny apply to the limited extent that they classify the student campaign expenditures as "speech" worthy of First Amendment protection.

That ASUM campaign expenditures constitute speech is not, however, the end of the matter. The speech at issue occurred in the University of Montana student election system, and, subject to constitutional limitations, government has the power to control speech in its school election system to preserve the character of that system. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,* 473 U.S. 788, 800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). "The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 44, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). In *Cornelius,* the Supreme Court reaffirmed that when examining government speech limitations, we are to

examine the nature of the restriction: "[T]he Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." 473 U.S. at 800, 105 S.Ct. 3439.[FN5]

> FN5. That the ASUM student election system "is a forum more in a metaphysical than in a spatial or geographic sense" does not affect our analysis because the Supreme Court has made clear that forum analysis is equally applicable to both spatial and metaphysical fora. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); *see also Cornelius*, 473 U.S. at 800-02, 105 S.Ct. 3439 (rejecting contention "that a First Amendment forum necessarily consists of tangible government property" in applying forum analysis to a charitable contribution program); *Perry*, 460 U.S. at 46-47, 103 S.Ct. 948 (applying forum analysis to a school mail system) As more fully explained below, when the government opens a forum, such as a student election, the government retains the ability, within constitutional bounds, to limit the use of that forum to its intended purposes.

Here, both parties eschew forum analysis as the proper framework within which to analyze Flint's claim that the campaign expenditure limitation violates the First Amendment: Flint points to *Buckley* while defendants point to *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). We disagree on the one

point upon which the parties agree: their contention that traditional First Amendment analysis is inapplicable here. To demonstrate why we disagree, we briefly address each party's contention.

***827 B.**

1.

On the one hand, Flint vigorously asserts that student spending as part of the ASUM election is "political speech" that may be regulated only subject to strict scrutiny. Flint equates the ASUM student government to state and national government: "The role of the ASUM officers is no less important to society than is that of the Montana state government." Based on his equation of ASUM student leaders to elected political officials, Flint contends that *Buckley* is controlling and mandates that the ASUM campaign expenditure limitations be struck down as an unconstitutional limitation on speech. [FN6]

> FN6. In *Buckley,* the Supreme Court struck down portions of the Federal Election Campaign Act of 1971 that limited campaign expenditures on behalf of candidates in federal election campaigns on the ground that such limitations violated the First Amendment. 424 U.S. at 58-59, 96 S.Ct. 612. The Court held that the governmental interests advanced in support of expenditure limitations would need to satisfy strict scrutiny, and did not do so. *See id.* at

44-45, 96 S.Ct. 612.

Flint's arguments are unpersuasive. We may not simply ignore the facts that the campaign expenditure limitations in this case involved election to *student government* and that the expenditures occurred mostly, if not exclusively, on a *university campus.* The educational context of a university, the specific educational purpose of ASUM student government, and the numerous other limits placed upon student campaigning distinguish the campaign expenditure limitations in this case from those in cases such as *Buckley,* which involved campaigns for national political office. Furthermore, while ASUM undoubtedly has an impact on students at the University and has certain powers to distribute funds among student groups, it simply does not follow that ASUM is akin to a political government or that the ASUM election is the equivalent of a congressional race. The ubiquity with which political government is present to control facets of our lives is not-thank Heavens!-replicated by student government in students' lives.

The University uses ASUM primarily as an educational tool-a means to educate students on principles of representative government, parliamentary procedure, political compromise, and leadership. In contrast to participation in state or national politics, participation in ASUM student elections is limited to ASUM-enrolled University students-students must maintain at least a 2.0 grade point average to run for office and only students are allowed to vote in the election. Unlike state and national governments, ASUM is a creature of the Board of Regents, whose policy calls for ASUM's Constitution and conditions the

validity of the constitution on the University president's approval. Indeed, ASUM's entire operation is subject to the Board of Regents' policies and campus policies.

Thus, given the nature of this student organization and the environment in which it exists and operates, ASUM student officeholders are not the equivalent of elected political officeholders. As the Eleventh Circuit explained in a case dealing with similar campaign limitations for student government, "this is a university, whose primary purpose is *education,* not electioneering. Constitutional protections must be analyzed with due regard to that educational purpose, an approach that has been consistently adopted by the courts." *Ala. Student Party v. Student Gov't Ass'n of the Univ. of Ala.*, 867 F.2d 1344, 1346 (11th Cir.1989). We should not apply the principles of *Buckley* without first considering ***828** whether the university setting affects our First Amendment analysis. *See Widmar,* 454 U.S. at 267 n. 5, 102 S.Ct. 269. [FN7]

FN7. In *Welker v. Cicerone,* 174 F.Supp.2d 1055, 1065 (C.D.Cal.2001), a district court in our circuit addressed a similar campaign expenditure limitation on a university campus and held that *Buckley* was controlling because the court found no difference between a student election and a political election: "The court sees no reason to distinguish between applying *Buckley* to state political elections and political elections at state universities." We see the several differences detailed above between ASUM's elections and state and national political elec-

tions and therefore have no trouble making such a distinction.

2.

We likewise disagree with defendants' position, and that of the district court, that the university setting dictates that we must defer to all reasonable decisions imposed on student speech during the election process rather than first engaging in a forum analysis. Relying on passages in *Widmar* that public universities have the right to determine "who may teach, what may be taught, how it shall be taught, and who may be admitted to study" and the right to "make academic judgments as to how best to allocate scarce resources," defendants assert that absent a showing of unreasonableness, the spending limits are *per se* constitutional because ASUM is an educational tool, and the University desires that leadership opportunities be available to as many students as possible. 454 U.S. at 276, 102 S.Ct. 269 (internal quotation marks omitted). We should defer, defendants contend, to their judgment in reasonably regulating speech regardless whether the regulation advances the purpose of the forum the University has provided for the speech.

We do not read the Supreme Court's cases to require such deference without first scrutinizing more carefully the nature of the student election forum and the government's interest in limiting speech within that forum. Although the Supreme Court in *Widmar* discussed the unique setting of a university campus, it also stressed that its "cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities." 454 U.S. at 268-69,

102 S.Ct. 269. "The University's institutional mission, which it describes as providing a *secular* education to its students, does not exempt its actions from constitutional scrutiny." *Id.* at 268, 102 S.Ct. 269 (internal quotation marks and citation omitted). The Court looked to the nature of the property, explaining that the university in *Widmar* had "created a forum generally open for use by student groups" and therefore the university had "assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms." *Id.* at 267, 102 S.Ct. 269.

The Supreme Court has applied forum analysis in other, similar cases involving speech limitations on a university campus. In *Rosenberger v. Rector & Visitors of University of Virginia,* 515 U.S. 819, 828-30, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), the Supreme Court characterized a university student fund responsible for monetary reimbursements to student groups as a limited public forum. The Court then analyzed the student fund's denial of distributions to a university student religious group as viewpoint discrimination and subjected the denial to traditional First Amendment scrutiny. *Id.* at 830-37, 115 S.Ct. 2510.[FN8] Likewise, in ***829** *Board of Regents of University of Wisconsin System v. Southworth,* 529 U.S. 217, 229-35, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000), the Supreme Court ruled that a university activity fee charged to students, which fee was used to facilitate extracurricular student speech, was constitutional so long as the university's funding support was viewpoint neutral.

FN8. Of further relevance in *Rosenberger* is the Court's clarification of *Widmar*. Specifically, the

Court explained that *Widmar*'s language regarding a university's freedom to make judgments as to allocation of scarce resources, language relied on by defendants here, is applicable to the university's own speech, but not to restrictions of third-party speech on a university campus:

> [In *Widmar*], in the course of striking down a public university's exclusion of religious groups from use of school facilities made available to all other student groups, we stated: "Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources." 454 U.S. at 270, 102 S.Ct. 269. The quoted language in *Widmar* was but a proper recognition of the principle that *when the State is the speaker, it may make content based choices.* ...
>
> It does not follow, however, and we did not suggest in *Widmar,* that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.

515 U.S. at 833-34, 115 S.Ct. 2510 (emphasis added). We are presented in this case not with the speech of the University of Montana but with the speech of students involved in campaigning for student government. Here, it is Flint's spending of his own money that was regulated, not University funds or subsidies to Flint. Thus, contrary to defendants' assertions, *Widmar*'s reference to broad deference is not determinative.

In sum, we conclude that the constitutionality of the campaign expenditure limitation depends on the nature of the forum and whether the limitation on speech is a legitimate exercise of government power in preserving the character of the forum.[FN9]

FN9. Given that the speech at issue in this case is not "school-sponsored," *see supra* note 8, we need not consider whether the principles of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), apply with full force in a university setting-a question neither we, *see Brown v. Li*, 308 F.3d 939, 957 (9th Cir.2002) (Reinhardt, J., concurring in part and dissenting in part), nor the Supreme Court, *Hazelwood*, 484 U.S. at 273 n. 7, 108 S.Ct. 562, have definitively answered. Our sister circuits are split on the question. *Compare Kincaid v. Gibson*, 236 F.3d 342, 352 (6th Cir.2001) (en banc), *and Student Gov't Ass'n v. Bd. of Trs. of Univ. of Mass.*, 868 F.2d 473, 480 n. 6 (1st Cir.1989) ("*Hazelwood* ... is not applicable to college newspapers."), *with Hosty v. Carter*, 412 F.3d 731, 734-38 (7th Cir.2005) (en banc) (applying *Hazelwood* to university context), *and Ala. Student Party v. Student Gov't Ass'n of the Univ. of Ala.*, 867 F.2d 1344, 1346-47 (11th Cir.1989) (same). *Hazelwood* addressed whether a high school was required affirmatively to promote particular speech by allowing the speech's inclusion in a school newspaper. 484 U.S. at 266-74, 108 S.Ct. 562. Here, we are presented with student campaign speech in a forum opened by the University.

This is a scenario in which the University is not sponsoring, as in *Hazelwood,* any of the candidates' speech but is *allowing* the campaign-related speech.

We note that *Hazelwood* reinforces the conclusion that we must analyze the ASUM expenditure limitations within the confines of traditional forum analysis. In *Hazelwood,* the Supreme Court first determined that the high school student newspaper at issue was not a public forum for expression and concluded that in the specific setting of a high school, the school could "exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273, 108 S.Ct. 562. Here, the University seeks to avoid the threshold question-namely, what type of forum is the ASUM election-and asks us to defer to its reasonable, educational related regulations. As shown, neither the Supreme Court's nor this court's precedents permit such avoidance.

IV.

A.

Although the student campaign expenditures constitute speech protected by the ***830** First Amendment, "[e]ven protected speech is not equally permissible in all places and at all times." *Cornelius,* 473 U.S. at 799, 105 S.Ct. 3439. Indeed, the Supreme Court has made

clear:
Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.... [T]he Government "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated...."

Id. at 799-800, 105 S.Ct. 3439 (citation omitted) (quoting *Greer v. Spock,* 424 U.S. 828, 836, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976)); *see also Faith Ctr. Church Evangelistic Ministries v. Glover,* 480 F.3d 891, 906-07 (9th Cir.2007). Accordingly, we apply a forum analysis to determine when the government has legitimate interests in restricting the use of a forum to certain intended purposes that outweigh a speaker's interest in using the forum for a different purposes. *Cornelius,* 473 U.S. at 800, 105 S.Ct. 3439; *Faith Ctr.,* 480 F.3d at 907. "Forum analysis has traditionally divided government property into three categories: public fora, designated public fora, and nonpublic fora. Once the forum is identified, we determine whether restrictions on speech are justified by the requisite standard." *Faith Ctr.,* 480 F.3d at 907 (citation omitted).

On one end of the fora spectrum lies the traditional public forum, "places which by long tradition ... have been devoted to assembly and debate." *Perry,* 460 U.S. at 45, 103 S.Ct. 948; *accord Ark. Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 677, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998). Next on the spectrum is the

so-called designated public forum, which exists "[w]hen the government intentionally dedicates its property to expressive conduct." *Faith Ctr.*, 480 F.3d at 907. A designated public forum cannot exist in the absence of specific action on the part of the government. *Cornelius*, 473 U.S. at 802, 105 S.Ct. 3439 ("The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse."). A content-based restriction on speech in a public or designated public forum is subject to strict scrutiny, requiring the state to show a compelling interest in the restriction that is drawn narrowly to meet that interest. *Perry*, 460 U.S. at 45, 103 S.Ct. 948. A content-neutral time, place, and manner restriction is permissible so long as it is "narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication." *Id.*; *Faith Ctr.*, 480 F.3d at 907.

At the opposite end of the fora spectrum is the non-public forum. The non-public forum is "[a]ny public property that is not by tradition or designation a forum for public communication." *Faith Ctr.*, 480 F.3d at 907. We subject speech restrictions in a non-public forum to less-exacting judicial scrutiny: "[A]s long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view," the government may preserve the forum for its intended purposes. *Perry*, 460 U.S. at 46, 103 S.Ct. 948.

The government is not left with only the two options of maintaining a non-public forum or creating a designated public forum; if the government chooses to open

a non-public forum, the First Amendment allows the government to open the non-public forum for limited purposes. *831 The "limited public forum is a sub-category of a designated public forum that refer[s] to a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics.' " *Hopper v. City of Pasco,* 241 F.3d 1067, 1074 (9th Cir.2001) (alteration in original) (quoting *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.,* 196 F.3d 958, 965 (9th Cir.1999)); *see also Rosenberger,* 515 U.S. at 829, 115 S.Ct. 2510 ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics."). But "[o]nce [a government] has opened a limited forum, ... [it] must respect the lawful boundaries it has itself set." *Rosenberger,* 515 U.S. at 829, 115 S.Ct. 2510. Specifically, the government "may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum,' " *id.* (quoting *Cornelius,* 473 U.S. at 806, 105 S.Ct. 3439), "nor may [the government] discriminate against speech on the basis of its viewpoint," *id.; see also Faith Ctr.,* 480 F.3d at 907; *Cogswell v. City of Seattle,* 347 F.3d 809, 814 (9th Cir.2003).

B.

We conclude that the ASUM student election constitutes a limited public forum. While "the campus of a public university, at least for its students, possesses many of the characteristics of a public forum," *Widmar,* 454 U.S. at 267 n. 5, 102 S.Ct. 269, the forum in this case is not the University of Montana campus. Rather,

because Flint challenges the limitations on speech within the confines of the ASUM election, whether the speech is delivered on campus or off, the relevant forum is the ASUM election itself, with its accompanying rules and regulations.[FN10] *See Cornelius,* 473 U.S. at 801, 105 S.Ct. 3439 ("[I]n defining the forum we have focused on the access sought by the speaker."); *DiLoreto,* 196 F.3d at 965 ("The relevant forum is defined by the access sought by the speaker."). Although the ASUM election "is a forum more in a metaphysical than in a spatial or geographic sense," the forum analysis outlined above is equally applicable. *Rosenberger,* 515 U.S. at 830, 115 S.Ct. 2510; *see supra* note 5.

> FN10. While the spending limit is found in the ASUM Bylaws, the limitation is nonetheless one imposed by the government on the forum. The University, as required by Board of Regents policy, has established ASUM as the associated student organization on the campus. Neither party disputes that the forum and the associated limitations are attributable to the University.

The ASUM election is not a traditional public forum: unlike parks and streets, it has not "by long tradition or by government fiat" been "devoted to assembly and debate." *Perry,* 460 U.S. at 45, 103 S.Ct. 948; *see also Forbes,* 523 U.S. at 678, 118 S.Ct. 1633 ("The Court has rejected the view that the traditional public forum status extends beyond its historic confines....").

The ASUM election also is not a designated public forum. "To create a forum of this type, the government must intend to make the property generally available

to a class of speakers." *Forbes,* 523 U.S. at 678, 118 S.Ct. 1633 (internal quotation marks and citation omitted). "[G]overnment does not create a public forum by inaction or by permitting *limited* discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius,* 473 U.S. at 802, 105 S.Ct. 3439 (emphasis added); *see also Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.,* 941 F.2d 817, 822 & n. 5 (9th Cir.1991) (en banc).

*832 Here, the ASUM election provides for the selection of students to govern student affairs; the election does not provide University installations for outsiders to showcase ideas in general.[FN11] Thus, the ASUM election exists to allow campaigns for student office and to elect student representatives to ASUM leadership positions in order to provide student candidates a valuable educational experience. The ASUM Bylaws define campaigning "as any activity which directly or indirectly promotes the candidacy of one or more individuals for an office," including a candidate's personal appearances, the posting or publishing of advertisements, distribution of literature, lobbying voters, and the buying of votes with money, gifts, or alcohol. ASUM Bylaws art. V, § 2.A. While the Bylaws do not limit the *content* of campaign speech, the Bylaws certainly do not permit students or the general public to use the ASUM election system indiscriminately. *See Perry,* 460 U.S. at 47, 103 S.Ct. 948.

> FN11. This is in contrast to *Widmar,* where the state university had "created a forum generally open for use by student groups," 454 U.S. at 267, 102 S.Ct. 269, by "routinely provid[ing] University facilities for the meetings of registered

> organizations," *id.* at 265, 102 S.Ct. 269. The ASUM election is akin, rather, to the forum in *Perry*. There, the Supreme Court rejected the contention that a school mail system was a designated public forum because "there [was] no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public." 460 U.S. at 47, 103 S.Ct. 948; *see also Forbes*, 523 U.S. at 680, 118 S.Ct. 1633 (holding that a candidate debate was not a designated public forum because the station broadcasting the debate "reserved eligibility for participation in the debate to candidates" and made "determinations as to which of the eligible candidates would participate in the debate").

Thus, a careful review of the ASUM Constitution and the ASUM Bylaws shows the University's purpose of opening a limited public forum, in the form of the ASUM elections. *See Faith Ctr.*, 480 F.3d at 908 n. 8 ("A limited public forum is a sub-category of the designated public forum, where the government opens a nonpublic forum but reserves access to it for only certain groups or categories of speech."); *Hopper*, 241 F.3d at 1074 (same); *DiLoreto*, 196 F.3d at 965 (same); *see also Rosenberger*, 515 U.S. at 829, 115 S.Ct. 2510; *Ala. Student Party*, 867 F.2d at 1353 (Tjoflat, J., dissenting) (noting that regulations governing campaigns for student government at a university created a limited public forum). For example, a student's ability to participate in the forum as a candidate is selective and the standards are clear. To run for office, a student must be registered for seven or more credits during the fall and spring semesters, pay a student

activity fee, and maintain at least a 2.0 cumulative grade point average. ASUM Const. art. 7, § 1. Only students registered for at least one credit are allowed to vote in the ASUM election. *Id.*

Furthermore, unmistakably clear standards govern campaigning within the forum. Under the ASUM Bylaws, campaign materials may be displayed only after the official campaigning period begins. *Id.* § 2.B. The Bylaws prohibit any door-to-door campaigning in University residence halls or family housing. Campaign speech may occur in a classroom only with the consent of the professor. *Id.* § 2.E. Posters may be placed in residence halls only with the approval of the residence hall office and in the University Center only with the approval of the University Center office. *Id.* § 2.F.2, 3. On the University campus itself, campaign materials may be posted only on kiosks. *Id.* § 2.F.4. And, of course, student candidates are not allowed to spend more than $100 promoting their campaign. There is nothing in the ASUM *833 Constitution or Bylaws, or the record before us, to suggest that these limitations, save the expenditure limitation, do not apply equally to all who participate in a student campaign, candidates and noncandidates alike. There is also no dispute that the University, through ASUM, applies these policies consistently. The spending limits have been in place since 1970, and Defendant Gale Price, who ran on a ticket with Flint in the 2003 election, was censured along with Flint for violating the spending limits. *See Hopper*, 241 F.3d at 1076 ("[C]onsistency in application is the hallmark of any policy designed to preserve the non-public status of a forum.").

In summary, the restrictions on who may participate as a candidate or voter, and the regulations of the manner in which the campaign is conducted, together demonstrate that the ASUM election constitutes a limited public forum. This forum exists solely to allow campaigns for ASUM student office and the election of student representatives, thereby providing an educational experience for the student candidates and student voters.

C.

We now apply this framework to analyze the constitutionality of the campaign expenditure limitation. We must analyze whether the expenditure limitation is viewpoint neutral and reasonable given the purposes of the forum. *Rosenberger,* 515 U.S. at 829, 115 S.Ct. 2510; *Faith Ctr.,* 480 F.3d at 907; *Cogswell,* 347 F.3d at 814. Because government "must respect the lawful boundaries it has itself set" in opening a limited public forum, any restriction on speech which is not viewpoint neutral or is unreasonable, fails constitutional scrutiny. *Rosenberger,* 515 U.S. at 829, 115 S.Ct. 2510.

1.

Viewpoint neutrality is the requirement that government not favor one speaker's message over another's regarding the same topic. When "government has excluded perspectives on a subject matter otherwise permitted by the forum," the government is discriminating on the basis of viewpoint. *Faith Ctr.,* 480 F.3d at 912. If certain speech "fall[s] within an acceptable

subject matter otherwise included in the forum, the State may not legitimately exclude it from the forum based on the viewpoint of the speaker." *Cogswell,* 347 F.3d at 815. The Supreme Court has been clear that viewpoint discrimination occurs when the government "denies access to a speaker *solely* to suppress the point of view he espouses on an otherwise includible subject." *Cornelius,* 473 U.S. at 806, 105 S.Ct. 3439 (emphasis added); *see also Sammartano v. First Judicial Dist. Court,* 303 F.3d 959, 971 (9th Cir.2002) (recognizing that "where the government is plainly motivated by the nature of the message rather than the limitations of the forum or a specific risk within that forum, it is regulating a viewpoint"). "Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger,* 515 U.S. at 828, 115 S.Ct. 2510.

There is no dispute in this case that the spending limit applies equally to all ASUM student candidates, as do all other campaign restrictions. The district court was presented no evidence showing that the University, through the spending limit, is attempting to suppress a particular point of view in the context of the ASUM election. Conversely, as evidenced by Gale Price's censure, the record demonstrates that the spending limit is applied equally to all student candidates, regardless of their views.

***834** This case stands in contrast to *Rosenberger* and *Good News Club v. Milford Central School,* 533 U.S. 98, 107-08, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001), both of which involved viewpoint discrimination in a limited public forum. In *Rosenberger,* the Supreme Court found that by excluding funding to a student

religious group solely because the religious group promoted a particular religious perspective, the university was discriminating in a limited public forum on the basis of that group's viewpoint. 515 U.S. at 829-37, 115 S.Ct. 2510. Examining this holding in *Faith Center*, we explained that, "[b]ecause other student publications were free to discuss the topic of religion from a myriad of views other than the prohibited perspective, the University had discriminated on the basis of viewpoint." 480 F.3d at 913. Similarly, in *Good News Club*, the Supreme Court found viewpoint discrimination where a public school excluded a Christian club from meeting on the school's grounds while permitting nonreligious groups to meet at the school. 533 U.S. at 107-09, 121 S.Ct. 2093. The religious club sought only "to address a subject otherwise permitted [in] the [limited public forum], the teaching of morals and character, from a religious standpoint." *Id.* at 109, 121 S.Ct. 2093. Thus, exclusion of the religious group from the forum amounted to impermissible viewpoint discrimination.

Here, no evidence suggests that the University's desire to limit student candidate spending results from a desire to suppress any student's viewpoint or that the limitation in any way suppresses a particular candidate's viewpoint. The $100 limit does not apply solely to vegetarians, pacifists and Marxists, but not to meat-eaters, bellicists and fascists. Neither does the limit apply to candidates who might wish to abolish student government or at least intercollegiate athletics, but not to servile apple-polishers of the status quo or "jocks." Thus, the campaign expenditure limitation does not constitute viewpoint discrimination.

Flint's contentions do not persuade us to hold otherwise. Flint argues that the campaign expenditure limitation constitutes viewpoint discrimination because the limitation "[a]llow[s] noncandidate students, student associations and outside groups ... to speak with unlimited volume while limiting candidate speech."

The candidate/non-candidate distinction, however, is based on the *status* of the speaker, not on the speaker's viewpoint. The Supreme Court has held that in a non-public (or limited public) forum the government may "make distinctions in access on the basis of subject matter and *speaker identity*." *Perry,* 460 U.S. at 49, 103 S.Ct. 948 (holding that allowing different access based on the status of one union as the exclusive representative for the school district was not viewpoint discrimination because it distinguished based upon status, not particular views) (emphasis added); *see also Ariz. Right to Life Political Action Comm. v. Bayless,* 320 F.3d 1002, 1009-10 (9th Cir.2003) (noting that a statute restricting the political speech of Political Action Committees but not candidates or other participants did not discriminate by viewpoint). Here, the spending limit is directed at the student candidates because they are the focus of the forum's purpose. Whether such focus is reasonable to achieve that purpose is our next inquiry.

2.

We are also satisfied that the candidate spending limit is reasonable. The reasonableness inquiry "focuses on whether the limitation is consistent with preserving

the property [here the ASUM election] for the purpose to which it is dedicated." *DiLoreto*, 196 F.3d at 967; *see also Perry*, 460 U.S. at 50-51, 103 S.Ct. 948. Reasonableness ***835** is not the legal equivalent of narrow tailoring or least restrictive means; indeed, the government's chosen method to preserve the character of a limited public forum "need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808, 105 S.Ct. 3439; *accord Cogswell*, 347 F.3d at 817 ("[T]here is no requirement that a restriction in a limited public forum be narrowly tailored or the government's interest be compelling for a restriction to be reasonable."). So long as the government can reasonably justify its regulation on speech in the limited public forum in light of the purposes of the forum, the regulation passes constitutional muster.

Since its inception, ASUM has been subject to the University of Montana's educational mission. ASUM's faculty advisor explained that ASUM exists for "essentially educational purposes." ASUM's Constitution declares that ASUM is "organized exclusively for educational and nonprofit purposes." ASUM Const. art. II, § 1. The election of student representatives to ASUM leadership positions is designed to help further the educational purpose of ASUM. The evidence before us clearly shows that the University views the spending limitation as vital to maintain the character of ASUM and its election process as an educational tool, rather than an ordinary political exercise. ASUM's senior faculty advisor explained that the spending limit was adopted in the revised ASUM Constitution of 1969-1970 "as a measure intended to defend ASUM against being steered away from its properly educational goals." The "primary intent" of the spending

limits is "to prevent student government's being diverted by interests other than ones educational." It is thus obvious that the purpose of imposing the spending limit on student candidates is to serve pedagogical interests in educating student leaders at the University.

We find that the spending limits reasonably serve this pedagogical aim. ASUM exists to teach students responsible leadership and behavior. Imposing limits on candidate spending requires student candidates to focus on desirable qualities such as the art of persuasion, public speaking, and answering questions face-to-face with one's potential constituents. Students are forced to campaign personally, wearing out their shoe-leather rather than wearing out a parent's-or an activist organization's-pocketbook. Our conclusion is supported by the declaration of Gale Price, former ASUM President:

Unlimited spending in ASUM elections also would change the nature of the election process as a learning experience. The spending limits mean that students have to figure out no-cost or low-cost ways of campaigning. They have to plan ahead to figure out their strategy, rather than just dumping a lot of money into advertising materials at the last minute. They have to make decisions about allocating their resources effectively. Without spending limits, the well-off students would not have to face these constraints or make these kinds of decisions in the course of running for ASUM.

The spending limitation is thus consistent with the purpose of the limited public forum in providing student leaders an educational experience as they campaign for, and are elected to, student government.

See DiLoreto, 196 F.3d at 967.[FN12]

> FN12. Flint contends that the expenditure limitation teaches students "that the First Amendment doesn't protect political speech [and] how not to conduct elections in a free society." Aside from its obvious hyperbole, this argument is not persuasive. So long as the purported educational goal of the expenditure limitation-here, a lesson in strategy, campaigning, and leadership-is reasonably capable of fruition, any additional "lessons" that students like Flint might learn do not affect the reasonableness, and thus the constitutionality, of ASUM's regulations. Furthermore, nothing in the First Amendment requires universities to set up student elections to mimic exactly political elections and political fund-raising. It is beyond dispute that government may impose reasonable, viewpoint neutral restrictions even on pure political speech in limited public forums. *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678-83, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998); *Cogswell*, 347 F.3d at 814-18 (finding voter pamphlets a limited public forum and holding that a limitation on candidate's statements in voter pamphlets is viewpoint neutral and reasonable in light of the purpose of the forum).

Furthermore, it is reasonable for the University to confine this spending limitation to student candidates. Because the ***836** purpose of ASUM is to provide an educational experience to those students who actively

participate in the organization, it is reasonable for the University to limit the campaign expenditure limitation to student candidates. In *Perry*, where several teacher unions received different levels of access to a limited public forum, the Supreme Court explained that "[t]he differential access provided [the teacher unions] is reasonable because it is wholly consistent with the district's legitimate interest in preserv[ing] the property ... for the use to which it is lawfully dedicated.' " 460 U.S. at 50-51, 103 S.Ct. 948 (alterations in original) (quoting *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129-30, 101 S.Ct. 2676, 69 L.Ed.2d 517 (1981)). Here too, applying the spending limitation only to candidates helps preserve the nature of the ASUM election as an educational experience for those students actively participating therein. Even if not the best or most effective means of providing the student candidates the educational experience that the University seeks to provide through the ASUM elections, we are confident the spending limits reasonably serve the purpose of the forum. *See Cornelius*, 473 U.S. at 808, 105 S.Ct. 3439. In a limited public forum, the First Amendment requires nothing more.

V.

By creating a student election process, the University of Montana has opened a limited public forum dedicated to allow campaigning for and election to leadership positions in student government. The University's purpose in opening such a forum is to provide student candidates and student voters a certain type of educational experience. We hold that imposing an expenditure limitation on student candidates is viewpoint

neutral and serves to effectuate the purpose of the ASUM elections. We therefore affirm the district court's summary judgment in favor of defendants.

AFFIRMED.

C.A.9 (Mont.),2007.
Flint v. Dennison
488 F.3d 816, 07 Cal. Daily Op. Serv. 6274, 2007 Daily Journal D.A.R. 8268

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United States District Court,D. Montana,
Missoula Division.
Aaron FLINT, Plaintiff,
v.
George DENNISON, in his official capacity as President of the University of Montana, et al., Defendants.
No. CV 04-85-M-DWM.

March 28, 2005.

ORDER
MOLLOY, Chief Judge

I. INTRODUCTION

Plaintiff, Aaron Flint, filed this case against the University of Montana's President, the Associated Students of the University of Montana ("ASUM") and ASUM's individual members (collectively "ASUM"). He challenges ASUM bylaws that cap candidate campaign expenditures for all offices at $100.00 per election. Flint took matters in his own hands and deliberately violated the duly enacted campaign limits. After twice violating ASUM's spending restrictions-once during his successful presidential campaign in 2003 and then again in 2004 while running for senate-and a subsequent ASUM resolution preventing Flint from assuming the senatorial seat to which he was elected, Flint now contends the restrictions violate his First Amendment free speech rights.

In May 2004, I denied Flint's request for a temporary restraining order and, in August, denied Flint's motion for a preliminary injunction. Subsequently, on October

8, 2004, this Court, pursuant to Fed.R.Civ.P. 12(b), converted Defendants' motion to dismiss for failure to state a claim to a Rule 56 motion for summary judgment. For the following reasoning, I am granting Defendants' motion for summary judgment.

II. FACTUAL BACKGROUND

To ensure all students enjoy equal access to the educational benefits available through student elections and governance, ASUM has imposed campaign finance restrictions since 1970. The student governing body chose to impose spending caps (currently set at $100.00 for all offices) and to reimburse candidates for the first $10.00 they spend participating in student electoral politics and one half of their subsequent expenditures up to the $100.00 limit. Consequently, where a student spends up to $100.00 campaigning, only $45.00 will come from the student's own resources. Absent these restrictions, ASUM believes students with financial resources not ordinarily typical ***1217** for most, will monopolize the competition for limited seats by purchasing increased visibility and name recognition. This is perceived as detrimental to the educational experience of participating in the student government.

When Flint filed this case, he was ASUM President. While campaigning for that position in 2003, he violated ASUM's spending bylaws. At that time, the cap was $175.00 for a president-vice president candidate team. Flint and his running mate, current ASUM President Gale Price, spent roughly $300.00 on their campaign. ASUM censured the duo during the 2003-04 academic year-Flint's presidential term. Apparently, Flint was dissatisfied with only being censured, so he

violated the rules a second time.

Flint again broke the spending rules. In spring 2004, Flint successfully ran for an ASUM senate post. During his campaign, Flint spent $214.69 despite the expenditure limit of $100.00. He didn't publicly run on a platform of deceit but he relied on financial prestidigitation to get elected. The assumption that he placed himself above ASUM's electoral rules on purpose is probably a fair [FN1] Flint disclosed his second campaign finance violation on April 26, 2004, the day before the polls opened. The ASUM senate met two days later and, pursuant to § 5 of Article V of the ASUM bylaws, voted to deny Flint his seat should he be elected. Flint responded by filing this action.

> FN1. Indeed, in response to a reporter's inquiry as to whether he would encourage others to contravene election rules by spending more than the $100.00 limit during the 2004 elections, Flint declared, "You're damn right I will." Curtis Wackerle, *ASUM President Opposes $100 Spending Limit,* Montana Kaiman (U. of Mont.) 5 (Mar. 16, 2004).

III. ANALYSIS

A. Summary Judgment Standards

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate if "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." A genuine issue of material fact exists if there is sufficient evidence favoring the non-moving party for a

reasonable jury to return a verdict in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Once the moving party meets its burden, the non-movant must designate specific facts which show that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

B. Standard Applicable to Assess the Constitutionality of ASUM's Campaign Expenditure Limits on Student Candidates.

As this Court determined on August 20, 2004, the deferential standard of reasonableness applies to assess the constitutionality of ASUM's spending limits and not, as Flint urges, the strict scrutiny standard applied to campaign spending restrictions by the United States Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

State universities maintain the undeniable right to determine "on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Widmar v. Vincent*, 454 U.S. 263, 276, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957) (Frankfurter, J., concurring)). This deference to academic judgments confers upon universities ***1218** a parallel right to ensure the quality and availability of educational opportunities, even where the exercise of that right results in the exclusion of First Amendment activities. *See id.* at 277, 102 S.Ct. 269.

Public university students' First Amendment rights " are not automatically coextensive with the rights of adults in other settings.' "*Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986)). Rather, those rights must be considered in "light of the special characteristics of the school environment." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Consequently, student speech in the school setting is amenable to greater restriction than speech in the general public. *See Bethel*, 478 U.S. at 682-85, 106 S.Ct. 3159.

As indicated by the Supreme Court, a deferential standard of reasonableness governs First Amendment challenges in the educational context. Indeed, the Constitution "permit[s] reasonable regulation of speech connected activities in carefully restricted circumstances."*Tinker*, 393 U.S. at 513, 89 S.Ct. 733 (1969). Undisputed is a "[u]niversity's right to exclude even First Amendment activities that violate reasonable campus rules,"*Widmar*, 454 U.S. at 277, 102 S.Ct. 269, and that schools may impose limits on school-related speech "so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273, 108 S.Ct. 562. In *Hazelwood*, the Court upheld, against First Amendment challenges, a school official's decision to remove stories on controversial topics from the school paper. *Id.* at 276, 108 S.Ct. 562. The Court found that it could not reject as unreasonable the official's conclusion that the articles were not suitable for publication. *Id.* Similarly, in *Bethel*, the Court found school officials did not violate the First

Amendment by disciplining a high school student for using vulgar language during a school assembly. 478 U.S. at 682-85, 106 S.Ct. 3159. The Court deferred to the school's judgment that such speech, though acceptable in public, would "undermine the school's basic educational mission." *Id.* at 685, 106 S.Ct. 3159. Contrarily, the Court in *Tinker* found barring students from wearing armbands to protest the Vietnam war violative of free expression, noting that school officials did not reasonably fear the protest would disrupt school work or discipline. 393 U.S. at 513-14, 89 S.Ct. 733.

Here, Flint argues against the use of a reasonableness standard and, instead, asks the Court to impose the exacting scrutiny the Supreme Court applied to campaign spending restrictions in *Buckley*.The standard applied is dispositive in that the limit in question meets the former while it likely fails the latter. Flint relies on *Welker v. Cicerone*, 174 F.Supp.2d 1055 (C.D.Cal.2001), in which a federal district court, assessing the constitutionality of a similar university student government campaign spending limit, looked to *Buckley* as its basis for analysis. The *Welker* court noted *Buckley* was unequivocal in finding that "spending money in a political campaign directly affects freedom of speech," thus requiring the university to "demonstrate that their campaign expenditure restrictions serve a compelling interest and that they are narrowly tailored to effectuate the interest." *Welker*, 174 F.Supp.2d at 1064. While the court acknowledged in a footnote the "generally relaxed First ***1219** Amendment standard applicable to the college and university setting,"*Id.* at 1065 n. 6, it found "no reason to distinguish between applying *Buckley* to state

political elections and political elections at state universities." *Id.* at 1065.

I am not persuaded by the *Welker* court's reasoning. A significant basis exists for distinguishing the application of First Amendment principles in state or national political elections and in its application to student government elections at state universities. The Eleventh Circuit Court of Appeals explained this principle in *Alabama Student Party v. Student Government Association of the University of Alabama*, 867 F.2d 1344 (11th Cir.1989). There, university students challenged regulations adopted by the student government which (1) allowed distribution of campaign literature only during the three days prior to the election and only at select locations on campus; (2) banned the distribution of campaign literature on election day; and (3) allowed open forums or debates only during the week of the election. *Id.* at 1345. Following a survey of Supreme Court case law, the Eleventh Circuit chose to apply a reasonableness standard, finding that it "should honor the traditional reluctance to trench on the prerogatives of state and local educational institutions.' "*Id.* at 1347 (quoting *Regents of U. of Mich. v. Ewing*, 474 U.S. 214, 226, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985)). The basis for distinction between school elections and governmental elections, the court held, is one of purpose: "[T]his is a university, whose primary purpose is *education*, not electioneering." *Id.* at 1346 (emphasis in original).

The *Welker* court found the reasoning of *Alabama Student* inapposite, stating that the *Alabama Student* court based its decision on the " right ... to make academic judgments as to how to best allocate scarce

resources.' "*Welker*, 174 F.Supp.2d at 1063 (quoting *Alabama Student*, 867 F.2d at 1345). No such considerations are presented in a campaign finance case, the court reasoned, so *Alabama Student* should not apply. *Id.* at 1063-64.

However, the *Alabama Student* court did not, contrary to the *Welker* court's view, base its decision on the university's need to allocate scarce resources.[FN2] Rather, the court culled the allocation reference from *Widmar* as one example of when and why courts should defer to universities' academic judgments. *See Alabama Student*, 867 F.2d at 1345. Indeed, *Widmar* was just one of several Supreme Court cases cited, and relied upon, by the Eleventh Circuit in *Alabama Student*, including *Hazelwood*, *Bethel* and *Tinker*. *See id.* at 1345-47. The court based its decision upon the principles these cases collectively elucidate: a state university may, in the interest of preserving the quality and availability of educational opportunities for its students, place reasonable restrictions on free speech that would be impermissible outside of the academic environment. *See id.* at 1347 ("In the present case, and in other school cases raising ***1220** similar First Amendment challenges, these principles translate into a degree of deference to school officials who seek to reasonably regulate speech and campus activities in furtherance of the school's educational mission."). Here, the rule on spending limits not only levels the playing field, it makes the political field open to all students regardless of financial status. While not every university student chooses to participate in the educational opportunity student politics affords, the rule ensures that the occasion is not lost to the vicissitudes of student prosperity.

FN2. Even assuming a university's right to allocate scarce resources was the basis of the *Alabama Student* decision upholding the election regulations, it would not be inapplicable to this case. The ASUM senate, the body to which Flint sought election, consists of twenty senators. Thus, the educational opportunity offered by ASUM senate participation is limited to twenty students per year in a university with enrollment well in excess of 10,000. The university seeks to ensure equal access to that opportunity through its campaign spending restriction.

Participation in student government falls within the University's educational mission by instructing students on many aspects of the governmental process. Article 2, § 1 of the ASUM Constitution provides the avowed educational charge and policy of ASUM: "ASUM is organized exclusively for educational and non-profit purposes." ASUM is, and has always been, intended as a learning experience for students. *See e.g.* Decl. of Hayden Ausland PP 3-8 (describing ASUM's history and its current and historical stature as an educational opportunity). For instance, in his declaration, Hayden Ausland, ASUM's senior faculty advisor for the past 14 years and professor in Classics, details the learning experiences ASUM participation provides: ASUM offers students experience in many forms of leadership, through which they develop a variety of skills to handle the responsibilities that arise in student government. ASUM senators and executives learn how to address conflicting interests of diverse constituencies, how to make recommendations about

the allocation of budgetary resources, how to negotiate with administrators over matters such as tuition and fee increases, and how to draft policies and priorities for numerous student programs.

Id. P 6. Current ASUM President Gale Price, who previously served as Vice President, describes her own participation as strengthening her decision-making skills, teaching her how to work for the good of the University closely aside people with whom she often disagrees, and providing her with leadership experience. Decl. of Gale Price P 6.

Additionally, all ASUM executives and senators attend seminars during the fall semester. ASUM Bylaws art. II, §§ 2(D) & 3(D). The substance of these classes include topics such as parliamentary procedure, service learning and leadership skills. Ausland Decl. P 7. Along with classes, participation in ASUM requires students learn how to conduct themselves in accordance with Robert's Rules of Order, *see* ASUM Const. art. 4, § 7, an education on how to bring order to the sometimes chaotic debating and voting lost on many of today's aspiring public servants. The learning and experience gained by ASUM participation is integral to participants' education.

ASUM is a learning opportunity provided students as part of the University of Montana's educational mission.[FN3] ASUM's ***1221** role as an educational opportunity means the application of the reasonableness standard of review to the regulations is appropriate and explains why the student spending limits are not subject to the same standard as regulations imposed on candidates running for national or state offices.[FN4]

Thus, ASUM regulations are subject to a reasonableness standard.

> FN3. Professor Hayden Ausland notes the educational opportunity service in student government provides for those wishing to pursue a career in public service. Ausland Decl. P 8. In doing so, he points to the successes of past ASUM members such as former U.S. Senator Lee Metcalf, former University of Montana President Robert Panzer, and former Montana Attorney General Joe Mazurek. *Id.* One cannot question that participation in ASUM provides excellent preparation for such careers in public service but, as Professor Ausland remarks, "it is not yet that career itself." *Id.*

> FN4. As Defendants point out, "Unlike ASUM, neither Congress nor the Montana Legislature exists to further the education of persons elected to serve there (even if that may be an incidental effect in some cases)." Def.'s Br. Opposition to Pl.'s Mot. for Prelim. Inj. 9.

C. Reasonableness of ASUM's Student Campaign Spending Restrictions.

According the deference due the University's academic decisions regarding access to its educational opportunities, *see* *Widmar*, 454 U.S. at 276-77, 102 S.Ct. 269, I cannot say ASUM's campaign spending restrictions are unreasonable. As the declarations in this case make clear, ASUM's expenditure regulations are an effort by the University to assure that all students, regardless of personal or financial circumstances, have equal

access to the educational opportunities ASUM participation provides. *See e.g.* Austen Decl. P 9. Without some spending limits, financially able students have an advantage in attaining the learning experience of ASUM participation, *see* Price Decl. P 6.

Guaranteeing that students need not have substantial personal resources to have a fair opportunity to run for, and win election to, ASUM appears particularly important at the University of Montana. Over two-thirds of the student population at the University of Montana receive financial aid, including three-quarters of in-state students. Decl. of Myron Hanson P 6. Additionally, in 2002-03, 34% of undergraduates received Federal Pell Grants, which only the most financially needy students may obtain. *Id.* P 4. According to the Director of the University's Financial Aid Office, these percentages exceed most flagship public universities in the U.S. *Id.*Consequently, these students with limited financial resources are less likely to have access to the educational experience ASUM participation provides.

Rendering student government an educational opportunity for only those students who can afford to run, *see* Price Decl. P 6, is contrary to a university's educational mission. Professor Ausland adeptly explains this diametric contradiction: "To allow a wealthy student to monopolize access to election would be like allowing that same wealthy student a first shot at enrolling in some sought-after history class ... it would be unworthy of an American institution of public higher education." Ausland Decl. P 9.

To paraphrase an argument of Seth Waxman, counsel

for the defendants in *McConnell v. FEC*, 539 U.S. 981, 124 S.Ct. 33, 156 L.Ed.2d 693 (2003), if we reach the stage where participation in student government is perceived as only given to those interests with large money contributions, the fundamental predicate of student governance breaks down. When the cynicism of wealth invades the academy, students learn not the lessons of orderly governance but instead are imbued with the anti-egalitarian notion that wealth is power.

Overall, ASUM's spending restrictions are a reasonable attempt to maintain equal access to the pedagogical benefits of ASUM participation throughout the student body.

*1222 IV. CONCLUSION

Because ASUM's campaign expenditure restrictions are reasonable in light of ASUM's educational purpose, they do not violate Flint's First Amendment free speech rights.

Accordingly, it is HEREBY ORDERED:

1. Defendants' Motion to Dismiss (**Dkt. # 66**)converted to Rule 56 Motion for Summary Judgment is GRANTED;

2. Judgment shall be entered for Defendants and all other pending motions shall be DENIED as moot.

END OF DOCUMENT

[Filemarked July 13, 2007]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AARON FLINT, Plaintiff-Appellant v. GEORGE DENNISON, in his official capacity as President of the University of Montana-Missoula (UMT); et al., Defendants-Appellees, and GALE PRICE, President; et al., Defendants.	No. 05-35442 D.C. No. CV-04-00085-DWM District of Montana, Missoula ORDER

Before: GRABER, PAEZ, and BEA, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for an en banc rehearing and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b). The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

U.S. Const. amend. I (in relevant part)

Congress shall make no law . . . abridging the freedom of speech[.]

ASUM CONSTITUTION

Approved by ASUM Central Board
December 2, 1987

Approved by ASUM Student Membership
February 5, 1988

ARTICLE 1 NAME AND MEMBERSHIP

Section 1. The name of this organization shall be the Associated Students of the University of Montana.

Section 2. For the purposes of this Constitution, member shall be defined as any Student Activity Fee paying student of the University of Montana.

Section 3. For purposes of this Constitution, student shall be defined as anyone currently enrolled in The University of Montana.

* * * *

ARTICLE 7 ELECTIONS

Section 1. Only members as defined by Article I of

this Constitution are eligible to hold or run for any elective or appointed position in the Association, except for certain initiatives defined in this Constitution. All students registered for one credit or more are allowed to vote in any ASUM election. In order to hold any elective or appointed position, a member must be in good standing, which is defined as maintaining a 2.0 cumulative grade point average. No person shall hold or be a candidate for any two of the ASUM elective positions listed in Article 4, Section 2 at the same time.

Section 2. Elective procedures shall be enumerated in the Bylaws.

Section 3. Senators and Executives of the Association shall be elected during the General Elections as specified in the ASUM House Rules.

Section 4. Election to ASUM Senate and Executive office shall require:

(a) Members of the Association may file for candidacy by petitions signed by fifty (50) registered students.

(b) The Senate will be composed of twenty (20) candidates who receive the largest number of votes in the ASUM General Elections.

(c) The term of office for Senators and Executives shall extend from two weeks after the General Election until two weeks after the following year's General Election.

2003 Legislature
ASUM BYLAWS
Updated 04/17/04

ARTICLE I - MEMBERSHIP

Section 1. Definition of Membership: All students enrolled at The University of Montana who have paid the student activity fee for the current semester are ASUM members.

Section 2. Any member of the Association is entitled to vote, run for office (upon meeting qualifications) and to exercise the various rights and privileges of membership.

Section 3. The Activity Fee shall be assessed to all students registered for seven (7) or more credits during the fall and Spring Semesters. A reduced Activity Fee is assessed during the Summer Session.

Section 4. Students who have arranged with the University Controller's Office for temporary deferment of the student activity fee are active members of ASUM, as long as their fee status is satisfactory with the Controller's Office.

* * * *

ARTICLE IV - COMMITTEES AND BOARDS

Section 1. General.

A. Each committee shall have general jurisdiction over its assigned function.

B. Members of all boards and committees shall be appointed at the beginning of Fall Semester, although additional appointments may be made at any time.

C. Each standing committee and board, as enumerated in the Constitution and/or Bylaws, shall have the option to adopt rules of procedure for its own actions, as an aid to the Constitution and Bylaws, and shall be applicable only to the committee or board that adopts them. Individual rules of procedure shall have no effect when being considered by the Senate, unless the Senate has also adopted the rule or procedure.

D. Any committee member absent from three (3) or more meetings of one committee per semester without an excuse from either the committee chair or the Vice President shall be deemed to have resigned from that committee or board.

E. The Senate may remove the chair or member of any committee by a two-thirds (2/3) majority vote.

F. The President may establish new committees upon simple majority approval of the Senate.
G. All chairs and members of committees and boards shall be recommended by the President, in consultation with the Vice President, and confirmed by the Senate by a two-thirds (2/3) majority vote.

H. A quorum for all committee meetings shall be defined as a simple majority of the members of that committee currently holding positions on that com-

mittee.

I. Committee Chairs are responsible for setting the order of business and running their committee meetings. Unless their vote is needed to maintain a quorum, or is otherwise precluded in ASUM policies, committee chairs may vote only in case of a tie.

J. All approved actions of University Center Executive Board, SPA and Board on Budget and Finance may be forwarded to the next ASUM Senate meeting as a seconded motion, a seconded motion meaning that a resolution need not be submitted under New Business and after one week be debated under Old Business.

K. All ASUM committees shall meet at least once every four weeks of the academic year unless exempted by the Vice-President. The chair of the committee is responsible for contacting members of the committee, establishing a meeting time and location. The only committee exceptions to this are Constitutional Review Board, Elections Committee, and Interview Committee, which shall meet on an "as needed" basis.

Section 2. ASUM Relations and Affairs Committee:

A. The ASUM Relations and Affairs Committee shall be composed of eleven (11) members, five (5) of which shall be Senators. An ASUM Senator shall chair ASUM Affairs and Relations Committee.

B. The ASUM Relations and Affairs Committee shall be responsible for recommending all changes to the ASUM Bylaws and ASUM Personnel Policy.

C. The ASUM Relations and Affairs Committee shall

work on unbiased projects, ideas, or campaigns intended to increase student involvement in and student awareness of ASUM government in general or any particular issue(s) pertaining to ASUM.

D. The ASUM Relations and Affairs Committee shall enforce and oversee the execution of Article III, Section 2E and Section 2F of the ASUM Bylaws. Therefore, a motion passed by a two-thirds majority vote in the ASUM Relations and Affairs Committee can and will result in an unexcused absence for an ASUM Senator failing to accord with Article III, Section 2E or Section 2F of the ASUM Bylaws. Such decisions of the ASUM Relations and Affairs Committee may be repealed by a simple majority vote of the ASUM Senate.

E . The ASUM Relations and Affairs Committee shall also oversee the functions of the following ASUM executive agencies, in accordance with ASUM Personnel Policy:

1. UM Productions. The UM Productions Director shall be appointed by the President and approved by the Senate by a two-thirds (2/3) majority vote.

2. ASUM Legal Services - ASUM Relations and Affairs shall act as a board of directors to oversee the Legal Services Director and its program.

3. ASUM Administration

4. The Student Resolution Officer shall be appointed by the President and approved by a two-thirds majority vote of the Senate.

E. Student directors may be removed from office as stipulated by University of Montana policy and ASUM Personnel Policy.

* * * *

Section 4. Board on Member Organizations:

A. The Board shall be composed of five (5) members, of whom three (3) shall be members of the Senate and two (2) shall be students-at-large.

B. The Board on Member Organizations shall review all applications for groups and organizations that wish to register with ASUM and/or receive ASUM funding. Groups meeting recognition requirements will be forwarded to the ASUM Senate to be approved by a two-thirds (2/3) majority vote. This process shall occur after the second week of Fall Semester and continue throughout the school year. Recognition by ASUM will be valid, after recommendation by the Board on Member Organizations and subsequent two-thirds (2/3) vote of the ASUM Senate, until the beginning of the next Fall Semester. At that time, all groups must re-submit their recognition files to register with ASUM. Those groups, which were budgeted funds during the previous year, will continue to be allowed access to these funds during the recognition process unless their recognition is suspended or revoked. Any budgeted groups who do not re-register for ASUM recognition will not be allowed access to their ASUM account funds.

1. All groups requesting to participate in ASUM budgeting must return their fully completed recognition files to the Board on Member Organizations by the first Friday of Spring Semester to be considered for budgeting. Any group having discrepancies in their file that would prevent recognition must correct the problems completely before the third Friday of Spring Semester to still be eligible for ASUM budget-

ing.

2. No group returning its recognition file after the first Friday of Spring Semester will be allowed to participate in ASUM budgeting that school year.

C. If the Board has evidence that a group has failed to comply with the stated criteria necessary for ASUM recognition or has failed to meet all the responsibilities stipulated by ASUM, the Board has the option of sending a warning notice to the group specifying reasons for the warning and the corrective steps that must be taken within a period of no more than one month. The group shall have the opportunity within one week to have an informal hearing with the Board on Member Organizations. If the group fails to act, or the Board feels that the matter has not been resolved, the Board on Member Organizations shall have the option of issuing a second and final warning letter or recommending to the Senate that the group's recognition be revoked. The Board may choose to move directly to recommending to the Senate that the group's recognition be revoked without a warning letter if an infraction or negligence is viewed as substantial.

D. For any group whose registration is suspended or any group that is suspended, or any group that the Board has determined should have its recognition revoked, there shall be an appeals process. The process shall be as follows:

1. The group shall be given a hearing by the Board within one week of the notice of impending loss of ASUM recognition.

2. After the hearing, if the Board does not rescind its

decision, the group may present its case to the Senate during the Vice President's report.

3. The Senate, by a two-thirds (2/3) majority vote, shall have the opportunity to overturn a Board's recommendation to remove group recognition.

E. The general policy of ASUM is to require membership lists of its recognized organizations to be available and open for inspection by the public. This policy is to promote openness and to ensure that recognized groups and organizations are composed of ASUM members. Since ASUM recognized groups and organizations receive access to various University facilities and have the ability to apply for ASUM funding, verification of membership for ASUM groups is required. Any group not providing a complete list of membership will not be recognized by ASUM.

F. Any group seeking ASUM recognition that desires the confidentiality of its membership must apply to the Board on Member Organizations for confidentiality approval. The application should contain an explanation of the purpose of the group and the need for confidentiality. If the Board on

Member Organizations approve the request, the group must accomplish the following:

1. A copy of a membership list must be provided to the Board on Membership Chair. This list must be kept confidential by the Chair.

2. The Board on Membership Chair shall confirm with the Registrar the membership list is composed of at least 15 eligible members.

G. Presentation of a falsified list to an advisor or to

the Board shall be grounds for removal or denial of ASUM recognition. Re-recognition may occur only on approval of the Board and upon such additional conditions that the Board may set.

H. A group containing non-members may achieve recognition so long as its total membership is at least 85% ASUM members.

I. Officers of organizations seeking ASUM recognition must be ASUM activity fee-paying students.

* * * *

Section 6. Elections Committee:

A. The Elections Committee, as appointed by the President and approved by the Senate, shall hold, monitor, and arrange the yearly elections for the offices of President, Vice President, Business Manager, and Senators, and shall conduct referendums. In addition, the Elections Committee shall conduct special elections as required. The Elections Committee shall be conducted according to the rules contained in the current edition of Robert's Rules of Order.

B. The Elections Committee shall be composed of twelve (12) members, of which four (4) shall be members of the Senate, seven (7) shall be students at large, with the ASUM Student Resolution Officer acting as an ex-officio member..

C. No member of the Elections Committee shall be seeking an elected position within ASUM.

D. Elections Procedures shall be enumerated in ASUM Bylaws, Article V.

Section 7. Interview Committee:

A. The ASUM Interview Committee shall be composed of five ASUM Senators and two students at large, and an ASUM Senator shall serve as Chair of the Committee.

B. The Committee shall be responsible for interviewing and recommending individuals for positions within ASUM. This may include vacant Senate seats, agency directorships, classified positions, and any other positions that the Senate may approve to be within the scope of the Committee.

Section 8. Publications Board:

A. The Publications Board will consist of seven voting members, chaired by the ASUM Business manager, who votes only in case of ties. The Pub Board will include one ASUM Senator and one student-at-large position, the Kaimin Editor, Business Manager, and Faculty Advisor, and a Business School faculty member appointed by the Dean of the Business School, who will be voting members of the Board.

B. The Board shall be responsible for appointing the Editor and Business Manager of the **Montana Kaimin**. Additionally, the Board shall appoint the Editor and Business Manager of Cutbank and any other ASUM-funded student publications.

C. The Board shall oversee the general operations of ASUM-funded publications, without infringing on First Amendment rights.

Section 9. Student Political Action Committee (SPA):

A. The Student Political Action Committee shall consist of 12 members, of whom five shall be members of the ASUM Senate, and six shall be students-at-large. The other position shall be occupied by the SPA Director. The Committee shall be chaired by an ASUM Senator.

B. The ASUM Office of Student Political Action shall be composed of one SPA Director.

C. The SPA Director and the ASUM lobbyist shall be appointed by the President and approved by the Senate by a two-thirds (2/3) majority vote.

Section 10. University Center Board

A. University Center Board shall consist of 9 members; three members who shall be subject to appointment by the President of the University, each serving three-year rotating terms, and five members who shall be recommended for appointment by the ASUM President, subject to a two-thirds (2/3) vote of the Senate. Of the five Board members appointed by ASUM, two shall be ASUM Senators serving one-year terms. The three student-at-large positions shall serve two-year rotating terms. The University Center Director or his/her designee shall serve as an ex-officio non-voting member of the UC Board. An ASUM Senator shall chair the Committee.

B. A quorum shall normally consist of five members of the Board.

C. The Chair shall act for the Board in its absence, subject to its review.

D. Special meetings may be called by the Chair or by two or more members.

E. Duties and functions of University Center Board shall include:

1. To provide advice and oversight about University Center policies, activities, and staffing;

2. Annually review, according to the UC Board Strategic Planning Budget Guidelines, the University Center budgets and fees, including, but not limited to, the Annual Operating Budget, Auxiliary Capital Fund, and UC Repair and Replacement account;

a. University Center budgets shall consist of the three years' previous actual figures with itemized line items for each expense and revenue.

b. University Center budgets shall also include proposed figures of the current academic year.

c. University Center budgets shall also contain the proposed figures of the upcoming academic year.

d. The University Center Board shall receive the budgets by December 1 for adequate time to analyze the budget.

3. Ensure that student, faculty, and staff interests are considered in deciding policies and other administrative matters involving the UC by helping the UC Administration to decide on these matters;
4. In consultation with the UC Administration, develop long-range planning goals and funding sources for UC development and use.

* * * *

Section 16. Student Radio Station:

A. The Radio Board shall be composed of seven members, chaired by an at-large student, who may make or break a tie. The other six members shall consist of

the General Manager of the Student radio station, a faculty member of the Radio Television Department chosen by the chair of the Department, a student at-large, one DJ elected annually by the DJs, an ASUM Senator, and the Director of the Department of Information and Technology or designee. Students shall be appointed and serve pursuant to the ASUM Constitution and Policies.

B. A quorum shall normally consist of four members of the Board.

C. The Board shall be responsible for the yearly appointment of the General Manager. The Board shall also be responsible for approving the General Manager's recommendations for positions listed in Item 4.60 of Personnel Policy.

D. The Board shall oversee the general operations of the student radio station. This shall include approval of all major format or structural changes, as well as approval of the student radio budget to be submitted by the General Manager on a yearly basis.

ARTICLE V - ELECTIONS

Section 1. Eligibility:

A. Members may seek office within these guidelines:

1. Any member as defined in Article I, Section 2 of the Constitution is eligible to run for any office.

2. A potential candidate must file a petition with the Elections Committee. Petitions are available from the Elections Committee and must consist of the signatures, printed names, ID numbers, and telephone numbers of at least 50 members registered during Spring Semester of the election. A student political party may present a slate of potential candi-

dates for any or all elective positions upon petition of at least 50 students, registered during Spring Semester of the election, per potential candidate. The names of all potential candidates who are members of parties must be named on the petitions for that party. Potential candidates for President must run with a potential candidate for Vice President as a single ticket, with a joint petition containing at least 100 signatures.

3. The names of all candidates shall be published in the Montana Kaimin immediately after the validation of petitions by the Elections Committee. The names of the winners of a primary election, if one is held, shall be published immediately following the election. Notices of special elections shall be conspicuously printed in the Montana Kaimin at least four times before the elections, including two issues immediately preceding the election.

4. Any member as defined in Article I, Section 2 of the Constitution is eligible to run as a write-in candidate. Write-in candidates shall not be printed on any ballot or participate in any ASUM-sponsored pre-election activities. Write-in candidates must adhere to the same campaigning and budget restrictions as recognized candidates. Write-in candidates need not be recognized by the Elections Committee.

Section 2. Campaigning:

A. Campaigning is defined as any activity which directly or indirectly promotes the candidacy of one or more individuals for an office. This includes, but is not necessarily limited to, scheduling appearances, the buying of votes with money, gifts, or alcohol, posting or publishing advertisements, distributing

literature, or lobbying a voter.

B. No campaign materials may be displayed before the start of the campaigning period. Posting signs for place-holding before the start of campaigning is not permitted.

C. Campaigning through speech or signs within the immediate polling sites on the days of primary and general elections is not permitted. Posters must be removed on the floor level of the designated polling sites, including the atriums of the University Center. Failure to remove campaign materials from non-polling sites is not considered a violation.

D. The Elections Committee shall sponsor at least two forums: one for the Senate candidates, and one for the officer candidates, plus one Presidential-Vice Presidential debate following the primary, if there is one.

E. No door-to-door campaigning is permitted in the residence halls or family housing. Campaigning is permitted elsewhere on campus, including the Lodge and classrooms with permission of the professor.

F. Posters may be placed on campus according to these rules:

1. General Buildings: Only on appropriate postering areas.

2. Residence Halls: Only on appropriate bulletin boards or dorm doors and windows with the approval of the dorm resident. All posters must be approved by the residence hall office.

3. University Center: Must be approved by the University Center office. Posters may be placed only on bulletin boards and interior glass surfaces. Banners

will be allowed only inside the University Center.

4. Outdoors: Only on kiosks.

5. No posters may be put on exterior doors of any building on campus.

G. Campaign expenditures, including donations, by each candidate or write-in candidate shall be limited to these amounts:

1. President-Vice president team: The maximum expenditure allowed is $100.

2. Business Manager: The maximum expenditure allowed is $100.

3. Senators: The maximum expenditure allowed is $100, with or without a primary election. For parties of three or more candidates, the maximum amount allowed is $200. This requirement also holds for officer candidates. For example, if an officer candidate and two or more Senate candidates formed a party, their expenditures would be limited to $200.

4. Candidates may choose to be reimbursed for campaigning expenditures to the amount of $10, dependent upon receipts following the General Elections. Expenditures exceeding $10 will be matched 50% by ASUM. Total ASUM contributions shall not exceed $50 for Senate and Business Manager candidates, $75 for President/Vice President candidates, and $100 for slates. All claimed expenditures for reimbursement must have receipts. Expenditures without receipts will not be matched by ASUM.

5. All contributions to ASUM candidates must be from students. Money from corporations and Political Action Committees is strictly prohibited.

H. Each candidate, write-in candidate, candidate

team, or party must document expenditures for the Elections Committee and made public by filing an expenditure form, complete with receipts, by 3 p.m. two days prior to the general election. Expenditure forms must be filed even if there are no expenditures.

I. No ASUM sponsored organization shall be allowed to finance the campaign of any candidate for ASUM office, nor may any individual finance the campaign of a candidate in the name of an ASUM-sponsored organization.

[Filemarked August 3, 2004]

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

AARON FLINT, *Plaintiff,* v. George Dennison, in his official capacity as President of the University of Montana-Missoula ("UMT"), the Associated Students of the University of Montana ("ASUM"), Kyle Engelson in his official capacity as the ASUM Elections Committee Chair, Justin Baker, Averiel Wolff, Sophia Alvarez, Anna Green, Kris Monson, Derek Duncan, Katie Boeckx in the official capacities as Elections Commissioners for the Associated Students of UMT, *Defendants.*	Cause No. CV-04-00085-M-DWM **Affidavit of Aaron Flint in Opposition to Defendants' Motion for Dismissing Amended Complaint**

I, Aaron Flint, make the following declaration pursuant to 28 U.S.C. § 1746:

1. I am over eighteen years of age, and the information contained in this affidavit is based *2 on personal knowledge.

2. During the 2004 elections of the Associated Students of the University of Montana ("ASUM"), posters criticizing me were placed on the UMT campus. The example attached as Exhibit A is a true and accurate copy of one poster that was used. To the best of my information and belief, hundreds of these and/or similar posters were placed on campus. They were

placed all over campus but most heavily in the campus' large Liberal Arts building. In some cases two oversized posters were placed in a single classrooms.

3. To the best of my information and belief, leaders from leaders from Montana Public Interest Research Group ("MontPIRG") and the University of Montana College Democrats placed most, if not all, of these posters.

4. Some students thought that the posters were mine and that I was wasting money on ads that made no sense, and others that I was making a joke out of the campaign by placing them. I contacted the school newspaper, the Montana Kaimin, via unreturned phone calls to the editor and an unpublished letter to the editor, in hopes of explaining to the UMT student body who was responsible for the posters. To my knowledge, no disclaimer or attribution was ever made regarding those placing the posters.

5. I had to compete with these ads, meaning I had to spend more than any other student to get my message out.

6. The effect of the ASUM spending limits is to allow unlimited undisclosed third party political speech while limiting candidates' ability to respond or counter it. Students who are supported by such groups can rely on them for support, while students unsupported by such groups, those with a minority voice, cannot compete with them because their spending is limited. I believe the spending limits therefore limit diversity in student government. *3

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowl-

edge, information, and belief.

Executed on July 26, 2004

/s/ Aaron Flint

Aaron Flint

Affidavit of Aaron Flint

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(2)

No. 07-459

FILED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

AARON FLINT,

Petitioner,

v.

GEORGE DENNISON, in his official capacity as President of the University of Montana-Missoula, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the unanimous decision of the Court below correctly upheld, against constitutional challenge, a rule for student government elections at the University of Montana-Missoula that requires students to adhere to limits on their spending in campaigns for student government office.

2. Whether Petitioner's claims are moot.

LIST OF PARTIES

Aaron Flint, Petitioner.

George Dennison, in his official capacity as President of the University of Montana-Missoula; the Associated Students of the University of Montana, Kyle Engelson, in his official capacity as the ASUM Elections Committee Chair; Justin Baker, Averiel Wolff, Sophia Alvarez, Anna Green, Kris Monson, Derek Duncan, and Katie Boeckx, in their official capacities as ASUM Elections Committee Members; ASUM President Gale Price, ASUM Vice President Vinnie Pavlish and ASUM Business Manager Cassie Morton, in their official capacities as ASUM Executive Officers and ex-officio members of the ASUM Senate; Jessica Adam, Bryce Bennet, Andrew Bissell, Brad Cederberg, Tyler Clairmont, Nezha Haddouch, Shawna Hagen, Chris Healow, Andrea Helling, Derf Johnson, Britta Padgham, Kimberly Pappas, Josh Peters, Rebecca Pettit, Jake Pipinich, Ross Prosperi, Jon Snodgrass, Leslie Venetz, Nathan Ziegler, and Casey Hogue, in their official capacities as ASUM Senators, Respondents.

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BRIEF IN OPPOSITION

Respondents George Dennison, President of the University of Montana-Missoula; The Associated Students of the University of Montana; *et al.*, respectfully submit this brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

The University of Montana-Missoula ("UM") offers qualified students the opportunity to run for and serve on a student government organization, the Associated Students of the University of Montana ("ASUM"). Among the many rules that apply to the competitive selection process for ASUM officers are limits on the amount of money students may spend on their campaigns for student government, and requirements for reporting and disclosing their expenditures. App. 70a. The spending limits serve to preserve the educational character of ASUM and to ensure that the opportunity to participate in student government is open equally to all students, regardless of their financial resources. App. 35a-36a.

Petitioner Aaron Flint ("Petitioner") commenced this action in 2004 when he was in his fourth and final year at UM. He sought declaratory and injunctive relief against the ASUM by-laws that impose spending limits on campaigns for student government office. Petitioner brought the action solely on his own behalf, not as a class action. He graduated in December

2004 and is no longer eligible to run for the ASUM Senate. App. 9a.

A. Statement of Facts

1. Facts Concerning ASUM

The ASUM Senate consists of three elected student executives (a president, vice-president, and business manager), twenty elected student senators, two non-voting faculty advisors, and other non-voting ex-officio positions as needed. ASUM Const. art. 4, § 1.[1] Since its 1906 inception, ASUM has been part of the UM educational mission.[2] The current ASUM Constitution provides that "ASUM is organized exclusively for educational and non-profit purposes[,]" with the primary responsibility of "serv[ing] as an advocate for the general welfare of the students." ASUM Const. art. 2, § 1. ASUM government and activities must comply with Montana state law and "the policies of the Montana State Board of Regents on Higher Education." *Id.* at § 4.

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[1] The full text of the ASUM Constitution may be found at http://www.umt.edu/asum/constitution.htm#2 (visited November 11, 2007).

[2] Declaration of Hayden Ausland in Regard to Plaintiff's Motion for Preliminary Injunction, May 27, 2004 ("Ausland Decl."), at ¶¶ 8-11 (R.29). Professor Ausland had served as ASUM faculty advisor (and a member of the ASUM Senate) for 13 years at the time he provided his Declaration. *Id.* at ¶ 2. In this Opposition, "R.___" refers to the docket number of the referenced filing in the district court.

ASUM is designed as a blend of republican and parliamentary governmental forms. Ausland Decl. at ¶¶ 6,10 (R.29). It offers students experience in many forms of leadership through which they develop various skills to handle student government responsibilities. *Id.* at ¶ 6. ASUM senators and executives have traditionally attended a special seminar or retreat each fall semester. *Id.* at ¶ 7; ASUM Bylaws art. II § 2.D.[3] These sessions may cover parliamentary procedure, service-learning or the promotion of leadership skills. Ausland Decl. at ¶ 7 (R.29).

Through ASUM participation, student senators and executives learn how to address conflicting interests of diverse constituencies; how to make recommendations about budget allocations; how to negotiate with administrators over matters such as tuition and fee increases; and how to draft policies for numerous student programs. The ASUM Senate thus gives students practical deliberative and legislative experience within the framework of the ASUM Bylaws and Constitution. This learning and experience form a significant part of these students' education. App. 3a; Ausland Decl. at ¶¶ 6-8 (R.29).

ASUM Senate membership is not open to the general public, nor to all members of the ASUM community (such as employees of ASUM), but instead

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[3] The full text of the ASUM Bylaws may be found at http://www.umt.edu/asum/government/bylaws.htm (visited November 11, 2007).

is open only to enrolled UM students who meet specific requirements. All ASUM officers must be registered for seven or more credits at UM during the fall and spring semesters (thereby paying the student activity fee) and must maintain at least a 2.0 cumulative grade-point average. App. 29a-30a; ASUM Const. art. 1 § 2, art. 7 § 1; ASUM Bylaws art. I § 3. In addition, students must run in and win election, following the rules established by the ASUM Constitution and Bylaws. App. 30a. A student who violates any election rules may be censured, denied ASUM campaign funding, barred from candidacy or prevented from taking office. ASUM Bylaws art. V §§ 5-6.

Because only a tiny fraction of the student body will have the opportunity to participate in student government during their four years at UM, it is particularly important that campaigns be governed by fair and uniform rules. The ASUM Constitution and Bylaws therefore significantly regulate student campaigns. For example, the Constitution requires that a student must file for candidacy by submitting petitions signed by 50 registered students. ASUM Const. art. 7 § 4(a). In addition, to assure that students need not ignore other academic pursuits in order to campaign for ASUM, the ASUM Bylaws limit the campaign period to three weeks. ASUM Bylaws art. V § 7. The Bylaws also prohibit the display of any campaign materials or the use of any place-holder signs prior to the start of the campaign period, ASUM

Bylaws art. V § 2.B,C;[4] prohibit door-to-door campaigning within residence halls or family housing, ASUM Bylaws art. V § 2.F; allow campaigning in classrooms only with instructor permission, *id.*; prohibit the placement of campaign posters except in very specific locations, ASUM Bylaws art. V § 2.G; and, at issue here, limit how much money a student may spend on his or her campaign, ASUM Bylaws art. V § 2.H.

Once elected, all ASUM officers must follow ASUM Personnel Policy requirements. ASUM Bylaws art. II § 2. An ASUM officer may be recalled from office for failure to perform the duties prescribed by the Bylaws. ASUM Const. art. 14 § 1; ASUM Bylaws art. II § 2, art. III § 2.

Because of ASUM's educational function, and the limited number of seats available, UM has a critical interest in making the ASUM election process fair and open to all qualified students, regardless of their

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[4] Contrary to the statement at p.5 of the Petition, this rule, and other rules governing the placement of posters and electioneering, apply to campaigning generally, not solely to candidates, ASUM Bylaws art. V § 2.B,C,F,G,H. App. 69a-70a. *See also* App. 30a. In addition, the grievance procedure regarding election law violations is not limited to violations by candidates. ASUM Bylaws art. V § 6A ("Any member who wishes to file a complaint concerning any action involved with campaigning or the election, *including, but not limited to*, rules violated by other candidates, voting discrepancies, and other procedures may submit a signed complaint to the Elections Committee. . . ." (emphasis added); *id.* § 6.D ("sanctions may include censure. . . .").

economic means. ASUM election spending limits, in place since 1970, App. 35a, help preserve the educational character of student government by ensuring that election to ASUM does not depend on the amount of personal or family resources available for a student to spend on an election campaign and that fundraising does not become a preoccupation for students.

This is particularly important at UM because of the acute financial needs of many UM students. Approximately two-thirds of the student body (and three-quarters of in-state students) use financial aid services and of those, a full 34 percent are eligible for federal Pell Grants awarded to the neediest students.[5] Indeed, a large percentage of UM Pell Grant recipients have family incomes so low that their federal application shows an Expected Family Contribution (EFC) of zero – the lowest possible amount. Hanson Decl. at ¶ 5 (R.29). If students were to begin winning election to the ASUM Senate by spending large sums on their campaigns, students without personal or family resources to spend on student elections would be discouraged from seeking the opportunity to participate. *Id.* at ¶ 10.

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[5] Declaration of Myron Hanson in Opposition to Plaintiff's Motion for Preliminary Injunction, May 25, 2004 ("Hanson Decl."), ¶¶ 4,6 (R.29). Mr. Hanson had been Director of the UM Financial Aid Office for 18 years at the time he provided his Declaration.

According to Goal B(2) of The Montana University System Strategic Plan, the University System seeks "to make sure that every academically qualified individual has an opportunity to receive the benefits of higher education without financial or social barriers."[6] Ensuring fair access to student government participation is thus important to the University's overall mission and goals. As Professor Ausland, ASUM's senior faculty advisor, explains: "To allow a wealthy student to monopolize access to election would be like allowing that same wealthy student to buy a first shot at enrolling in some sought-after history class, *i.e.*, it would be unworthy of an American institution of public higher education." Ausland Decl. ¶ 9 (R.29).

The ASUM election spending limits also serve UM's important educational interest in promoting diversity in its programs.[7] UM places great importance on attracting and retaining students from highly diverse backgrounds. *Id.* Diversity in student government, like diversity in the student body as a whole, enhances the education of all who participate by assuring their exposure to a wide variety of opinions and life experiences. *Id.* Absent spending limits,

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[6] Exhibit 2 to Declaration of Charles Couture in Opposition to Plaintiff's Motion for Preliminary Injunction, June 2, 2004 ("Couture Decl.) (R.29).

[7] Couture Decl., ¶¶ 4-11 (R.29). Dean Couture had served as Dean of Students at UM for ten years at the time he provided his Declaration.

students from diverse backgrounds would be less likely to run for ASUM office.[8] This would harm all students.

Consistent with UM's goal to provide educational opportunity to all students, ASUM provides financial resources for student campaigns. First, ASUM provides partial funding of student campaigns. Candidates are reimbursed for the first $10 of their campaign spending, plus 50 percent of their expenditures over that amount, up to the spending limit. ASUM Bylaws art. V § 2.G.4. ASUM cannot afford to provide matching funds for expenditures if there is no spending limit.[9] Spending limits therefore serve an important function in budgeting UM resources.

Additional resources that the University provides for campaigning include free publication of candidate profiles in the student newspaper, the *Montana*

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[8] As Dean Couture explained, "Perhaps because I am an enrolled member of the Salish Tribe that is located on the nearby Flathead Indian Reservation, American Indian students freely share their stories with me regarding their financial situations. A disproportionate number of American Indian students who attend the University are economically disadvantaged and could not afford to run for elected student leadership positions if the University was unable to impose campaign-spending limits. Also, many of the University's International students would face the same dilemma. . . ." *Id.* at ¶ 9 (R.29).

[9] Declaration of Gale Price in Opposition to Plaintiff's Motion for Preliminary Injunction, June 2, 2004 ("Price Decl."), ¶ 10 (R.29). Gale Price was President of ASUM at the time she provided her Declaration, and had run on a ticket with Petitioner previously in 2003. *Id.* at ¶ 1.

Kaimin. ASUM Bylaws art. V § 1.A.3. During the three-week campaign period, there are also debates sponsored by ASUM at the University Center: a forum for Senate candidates, a forum for executive candidates, and another Presidential-Vice Presidential debate following any primary. ASUM Bylaws art. V § 2.D.

2. Facts Concerning Petitioner's Alleged Injuries

In 2003, Petitioner sought election as president of ASUM on a ticket with Respondent Gale Price, who ran for vice-president. Flint and Price exceeded the applicable $175 spending limit during their campaign, and also falsified their disclosure statements by failing to report their actual expenditures for the campaign. App. 4a-5a; Price Decl. ¶ 3 (R.29). Petitioner's filings in this case do not disclose any reason why he believed it necessary to outspend other students seeking to serve on student government or to falsify his disclosure statements in 2003. Flint and Price won the election. App. 5a.

Flint's and Price's violations of the reporting requirements and spending limits were discovered. The ASUM Senate decided not to disqualify them from serving in office because of these first violations. Instead, the Senate voted to censure them for their non-reporting and for exceeding the spending limit. Price Decl. ¶ 3 (R.29). It is possible that the censure was reflected in minutes of the ASUM meeting where

the vote was taken, although the record of this case does not include such minutes. There is no allegation that the censure appears on Petitioner's academic transcript.

Petitioner has never alleged that ASUM's requirements for reporting and disclosing the amount of a student's ASUM campaign expenditures are unconstitutional. Accordingly, regardless of the outcome of his challenge to the spending limits, there would be no basis to expunge from any record the censure with respect to his violation of the reporting requirements.

In Petitioner's subsequent ASUM Senate bid in 2004, he again ignored the applicable $100 spending limit. App. 5a.[10] Because of this violation, the ASUM Senate voted to disqualify him from serving another term on the Senate. This disqualification vote is reflected only in the ASUM's minutes of the meeting

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[10] Neither Petitioner's complaint nor his later amended complaint alleged that his excess spending in 2004 was prompted by third-party expenditures opposing his candidacy, nor did he advance any such argument in his motions for a TRO and preliminary injunction. However, after those motions were denied, in his response to defendants' motion to dismiss the complaint, Petitioner for the first time submitted an affidavit making that assertion, most of which was not based on personal knowledge. App. 73a-75a. For example, his contention that posters were placed by College Democrats and the Montana Public Interest Group, and that there were "hundreds" of such posters, were made only "on information and belief." App. 73a-74a. In their reply, Defendants objected to the affidavit because it was not based upon personal knowledge (R.74). The lower courts never ruled on the admissibility of Petitioner's affidavit.

at which the vote was taken; there is no allegation that it appears in Petitioner's transcript. The relevant portion of the ASUM minutes states in full:

> Elections (Engelson) – Approximately 850 students had voted by midafternoon today (first of two days of elections). The Elections Committee made the following ruling on Flint's campaign violation – spending over the limit stipulated in the ASUM Bylaws: Negate all votes Flint receives in this General Election. This was moved by Engelson-Healow. Previous question calls by Cossit-Ziegler and Holmes-Helling failed. After a previous question call by Winkle-Ziegler, the motion passed 14Y, 5N, 1A on a roll call vote (see Tally Sheet). Volunteers are needed to watch the polling sites. Engelson thanked Winkle for sharing the use of the Kaimin ad space.[11]

Exhibit 11 to Plaintiffs' Amended Verified Civil Complaint for Declaratory and Injunctive Relief, June 17, 2004 (R.37).

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[11] Before the election, Petitioner also received a letter from the ASUM elections chair stating that he would be removed from the ballot because of the rules violation, but at Petitioner's urging the Senate instead waited until after the election to take a vote on his removal. App. 5a.

B. Proceedings Below

Petitioner commenced this lawsuit on May 5, 2004, by filing a complaint together with motions for a temporary restraining order and preliminary injunction. Petitioner submitted no evidentiary support for the preliminary injunction other than the verified statements of his complaint. The District Court denied the temporary restraining order. App. 6a.

With their legal memorandum in opposition to the motion for preliminary injunction, the Respondents submitted declarations with exhibits from several individuals: ASUM senior faculty advisor Hayden Ausland; UM Financial Aid Director Myron Hanson; UM Dean of Students Charles Couture; and Gale Price, the ASUM President elected in 2004 who was the ASUM Vice-President during Petitioner's presidency.[12] On July 7, 2004, the District Court held a hearing on the preliminary injunction motion (R.65), and denied the motion on August 20, 2004 (R.78).

Prior to resolution of the preliminary injunction motion, the Respondents filed a Rule 12(b) motion to dismiss the complaint (R.26). Petitioner subsequently filed an amended complaint and the Respondents then filed a motion to dismiss the amended verified complaint (R.66). With his opposition to the motion to dismiss, Petitioner filed an affidavit (R.72), to which

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[12] *See supra nn.* 2, 5, 6, 9.

the Respondents objected for lack of personal knowledge by Petitioner (R.74).

By Order dated October 8, 2004, the District Court converted the 12(b)(6) dismissal motion to a motion for summary judgment, providing the parties an opportunity to submit further evidentiary materials if desired (R.89). The Respondents submitted an additional declaration from Gale Price (R.90). Petitioner submitted no further evidence.

On March 28, 2005, the District Court issued an Order and opinion granting summary judgment to Respondents. App. 40a-52a. On April 25, 2005, Petitioner filed a Notice of Appeal (R.94).

The Court of Appeals, after finding that Petitioner's claims were not mooted by his graduation, App. 7a-11a, affirmed the district court's judgment. Judge Bea's opinion for a unanimous Court correctly recognized that reasonable, viewpoint-neutral rules governing participation in student activities are permissible under this Court's First Amendment precedents. App. 31a. The Court rejected Petitioner's argument that the First Amendment analysis applicable to funding of campaigns for Congress, the state legislature, and other public offices directly controls the constitutionality of a university's rules for participation in student government. App. 16a-19a. As the Court observed: "We should not apply the principles of *Buckley* [*v. Valeo*, 424 U.S. 1 (1976)] without first considering whether the university setting affects our First Amendment analysis." App. 18a.

The Court of Appeals also rejected the Defendants' argument that the Court could uphold the student government spending limits without engaging in forum analysis because of the deference due to a school's determination of the policies necessary to carry out its educational mission. App. 19a-23a. Rather than give uncritical deference to the school's judgment, the Court held that it must "first scrutinz[e] more carefully the nature of the student election forum and the government's interest in limiting speech within that forum." App. 19a.[13] The Court applied forum analysis, viewing ASUM elections as a limited public forum and determining that the limits on students' campaign spending were permissible because they are both entirely viewpoint neutral and reasonable in light of the purpose of the forum. App. 31a-39a.

REASONS FOR DENYING THE WRIT

The Court of Appeals correctly recognized that student government is not the equivalent of national or

[13] To be clear, Respondents have never argued that the university setting requires absolute deference to regulations that touch upon expressive activities. Respondents argued that forum analysis was not necessary given that the challenged regulations meet the requirement of viewpoint neutrality set forth in such cases as *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), which did not directly engage in forum analysis. Nevertheless, the result is the same whether or not forum analysis is applied: the regulations are permissible.

state government and that rules governing elections for student government are not subject to the same First Amendment analysis as laws governing campaigns for public offices such as Congress or the state legislature. Its ruling upholding the student government spending limits is fully faithful to this Court's precedents recognizing that viewpoint neutrality is the touchstone for the constitutionality of university rules that are intertwined with the university's educational mission, and with the Court's precedents applying First Amendment principles to expressive activity within a limited public forum. *See, e.g., Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995). The only other Circuit to have reviewed a challenge to student government election rules also readily concluded that the First Amendment does not prohibit such rules. *Alabama Student Party v. Student Gov't Ass'n of the University of Alabama*, 867 F.2d 1344 (11th Cir. 1989). The rarity of federal court litigation over student government election rules and the lack of any conflict among the circuits that have considered the issue both confirm that the matter does not warrant this Court's intervention.

Moreover, even if the claim presented in this case were worthy of review, this case presents a poor vehicle for its consideration because it is unlikely Petitioner's claims would survive the threshold inquiry into mootness. Accordingly, the petition should be denied.

I. THE COURT OF APPEALS FAITHFULLY APPLIED THIS COURT'S PRECEDENTS, AND ITS DECISION IS NOT IN CONFLICT WITH THAT OF ANY OTHER CIRCUIT.

The Court of Appeals correctly held that the First Amendment permits universities to regulate students' participation in student government elections through viewpoint-neutral limits on students' campaign spending. Such limits are a reasonable means to preserve the purpose and educational character of student government participation. Indeed, to ignore the critical and significant distinctions between student government and student elections, on the one hand, and public office-holding and elections for public office, on the other, would misunderstand the purpose both of education and the First Amendment.

This Court has long recognized that "First Amendment rights must be analyzed 'in light of the special characteristics of the school environment.'" *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) (*citing Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969)). The Court of Appeals correctly determined that a standard requiring viewpoint neutrality, which the Court strictly applied to the challenged student government election rules, appropriately protects students' First Amendment rights while taking account of the educational goals that are intertwined with student government participation. Indeed, this Court's decision in *Southworth* confirms that, even when university policies carry a "high potential for intrusion" on students' First

Amendment rights, the policies will be upheld if they are strictly viewpoint-neutral. 529 U.S. at 232-234 (mandatory student activity fees used to support extracurricular student speech are permissible so long as they are administered in a viewpoint-neutral fashion, even though students are thus forced to subsidize speech they find objectionable or offensive). *See also Rosenberger*, 515 U.S. at 829-830 (university rules governing access to limited public forum must be viewpoint-neutral).

The ASUM spending limits, in force since 1970 and applicable to all candidates, are clearly viewpoint-neutral:

> There is no dispute in this case that the spending limit applies equally to all ASUM student candidates, as do all other campaign restrictions. The district court was presented no evidence showing that the University, through the spending limit, is attempting to suppress a particular point of view in the context of the ASUM election. Conversely, as evidenced by Gale Price's censure, the record demonstrates that the spending limit is applied equally to all student candidates, regardless of their views.

App. 32a.

The Court of Appeals, applying forum analysis, also correctly determined that the ASUM spending limits are reasonable in light of the purpose of the limited public forum that the University has created for ASUM elections. *Rosenberger*, 515 U.S. at 829

(restrictions must be "'reasonable in light of the purpose served by the forum,'" quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985)). The limits applicable to spending on student government campaigns, like the unchallenged rules restricting campaigning to a three-week period prior to the election and requiring candidates to have a minimum 2.0 grade point average, help structure a fair election process within the educational mission of the university. This process provides an opportunity for all qualified ASUM members to compete for the limited number of seats available on the ASUM Senate, and thus to access the opportunities for leadership and policy learning that Senate participation provides.

In the absence of spending limits, students having greater financial resources could gain a significant advantage in student government campaigns by paying less well-off students to do campaign work for them, and would have no need to inspire assistance from volunteers who agree with their campaign agendas. Price Decl. at ¶ 8 (R.29).[14] At the same time, students without significant personal or family resources would be required to spend substantial time on fundraising – and less time on their other

[14] As Respondent Price noted, "if a candidate could hire 200 workers for an evening of postering, they could monopolize most of the available poster space on campus before anyone else has a chance to get their posters up. This would give a huge edge to students who have a lot of financial resources." *Id.*

studies – if they wished to run a competitive student government campaign against students whose personal resources are essentially unlimited.[15] As noted in one affidavit, such a result would be no more acceptable than requiring the university to auction off seats for popular, over-subscribed classes to students who can afford to pay extra tuition for the coveted seat in class. Ausland Decl. ¶ 9 (R.29); *see also id.* (election rules are intended "to prevent student government's being diverted by interests other than ones educational").

Consistent with UM's goal to provide opportunity for higher education regardless of family resources, ASUM Bylaws also provide for partial funding of student election campaigns. ASUM Bylaws art. V § 2.H.4. These funds come from the ASUM budget. If students must be permitted to spend unlimited amounts on their campaigns, ASUM will not be able to afford to provide matching funds for students lacking such financial resources. Price Decl. ¶ 10 (R.29).[16] All of these considerations underscore the

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[15] As noted in the Statement of Facts, many students at UM are able to attend the University only because of the financial aid the University provides. *See supra* at 6. Sponsoring a pizza party for campaign workers, as Petitioner did with part of his excess spending, Pet. at 8, is one way for a candidate to boost his popularity, but the budgets of many students do not permit such outlays for campaign workers.

[16] The limits thus help ensure that the University may determine "how best to allocate scarce resources." *See Widmar*, 454 U.S. at 276. Indeed, the ASUM Senate seats are themselves a scarce resource, given that only 23 seats are available each

(Continued on following page)

reasonableness of UM's decision to include viewpoint-neutral spending limits among the rules governing campaigns for student government.

Thus, contrary to Petitioner's contention, the ASUM regulations are fully permissible under this Court's First Amendment precedents. The conflicts that Petitioner alleges with this Court's precedents and those of other circuits are illusory.

1. The Court of Appeals' decision does not conflict with *Buckley v. Valeo*, 424 U.S. 1 (1976), or the other campaign finance precedents on which Petitioner relies.[17] *Buckley* and its progeny address campaign finance laws governing elections for public office, not student government elections. To argue that the First Amendment recognizes no difference between student government elections and elections for public office such as Congress and the state legislature simply blinks reality.

The ASUM Senate is "organized exclusively for educational and nonprofit purposes," ASUM Const.

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year. Although the court below expressly declined to rest its decision on the principle that a university enjoys broad discretion in deciding how to allocate its own resources, App. 20a-21a, that principle provides another basis for upholding the spending limits here.

[17] *Randall v. Sorrell*, 126 S.Ct. 2479 (2006); *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

art. 2 § 1, and has an essential mission of helping to further the education of persons elected to serve there. *See* Statement of Facts, *supra* at 2-3. To state the obvious, the same is not true of Congress or a state legislature. Neither national nor state government is a creation of the Montana Board of Regents on Higher Education, as is ASUM, and neither, unlike ASUM, has a Constitution conditioned on the approval of the president of the University of Montana. ASUM Const. art. 13 § 4. Neither Congressional representatives nor state legislators are required to demonstrate a minimum grade point average to gain a place on the ballot, and such a requirement clearly would be unlawful for such offices. Yet even Petitioner concedes that such requirements are permissible for ASUM candidates. Pet. at 17. Unlike ASUM student candidates, candidates for Congress and the state legislature are not limited to a three-week campaign period to ensure that they and the student body can focus properly on their other academic pursuits. ASUM Bylaws art. V § 7. Again, such requirements would be impermissible as applied to candidates for public office, yet Petitioner never suggests they are unconstitutional.[18] The First Amendment does not

[18] Similarly, ASUM rules require that any contributions for student government campaigns must come only from students, App. 70a; ASUM Bylaws V § 2.H.5, a rule that could not be enforced at UM if precedents concerning campaigns for public office were directly controlling. *VanNatta v. Kiesling*, 151 F.3d 1215 (9th Cir. 1998) (striking down limits on donations from out-of-district residents). In addition, *Randall v. Sorrell* indicates that the First Amendment requires federal courts, at least in

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require the University to abandon all of these policies relating to ASUM elections merely because they would be unconstitutional as applied to elections for national and state government office. *Cf. Southworth*, 529 U.S. at 230 (university setting dictated modification of First Amendment analysis employed in Court's cases on forced subsidies for political expression: "the means of implementing First Amendment protections adopted in those decisions are neither applicable nor

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some circumstances, to parse the level of a specific contribution limit to assure that it does not systematically disadvantage challengers or favor incumbents. 126 S.Ct. at 2492-2500. To embroil the federal courts in this type of analysis of student government campaign limits would be absurd on its face. Yet that is the necessary consequence of accepting Petitioner's argument that this Court's precedents governing campaign finance laws in federal and state elections also control the constitutionality of rules concerning student government campaigns.

Indeed, if courts could not recognize a common-sense difference between student government elections and elections for public office, a host of unwelcome consequences would follow. Students must be enrolled at UM and pay a student activity fee in order to vote in ASUM elections; should this be treated as unlawful poll tax under the Twenty-fourth Amendment? Should the requirement of a 2.0 average for ASUM membership be invalidated as an unlawful literacy test? If a student falsifies a campaign disclosure statement in his election campaign, should this be treated not merely as a violation of student government rules but also a potential criminal violation under state disclosure requirements?

workable in the context of extracurricular student speech at a university").

Petitioner points to the role of the ASUM Senate in allocating student activity fees as indicating its equivalence with state and national government. However, the ASUM Constitution specifically provides that all such funds must be managed in accordance with Board of Regents policy, in addition to state and federal laws. ASUM Const. art. 8 § 5. Indeed, this is true of all ASUM activities. ASUM Const. art. 2 § 4 ("The ASUM government and activities must comply with Montana State law and the policies of the Montana Board of Regents on Higher Education").

Petitioner also attaches special significance to the fact that a spending limit could affect a student's efforts to campaign for ASUM office outside the university campus as well as on campus. Pet. at 24-25. As long as a student is seeking election to a student government position, however, the university surely can establish rules that apply to the student's overall campaign and not merely to on-campus activity – just as an athletic program may set conditioning requirements or curfews that affect a participant both on and off campus, or a university theater program may require student participants to forgo appearing in non-student productions (despite the obvious impact on expressive activity). In any event, the distinction is academic in this case because Petitioner presented no evidence that any of his excess spending was used for off-campus speech.

2. Petitioner also contends that the Court of Appeals' decision somehow conflicts with *Morse v. Frederick*, 127 S.Ct. 2618 (2007). Again, the conflict is wholly illusory. *Morse* upheld, against First Amendment challenge, a high school's decision to sanction a student who held up a sign that suggested support of drug use, even though the student was not on school property when he did so, and even though the student *concededly* was singled out for punishment because of the viewpoint expressed. The absence of a First Amendment violation in *Morse* in no way establishes the presence of a First Amendment violation here.

Petitioner points to Justice Alito's concurring opinion (joined by Justice Kennedy) in *Morse*, but nothing in the opinion suggests that the student government campaign rules at issue here are unconstitutional. The *Morse* concurring opinion made clear its disagreement with the argument that "the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission,'" 127 S.Ct. at 2637, because such a rule "would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed." *Id.* The Court of Appeals' decision here is fully consistent with this view (and with the holding of *Tinker* closely scrutinizing school censorship of "expression of one particular opinion," 393 U.S. at 511). The decision specifically states that student government election rules would violate the First Amendment if they involved discrimination based on

the speaker's viewpoint. App. 31a ("any restriction on speech which is not viewpoint neutral or is unreasonable, fails constitutional scrutiny"). The decision thus in no way suggests that viewpoint discrimination may be justified by a school's articulation of an educational mission served by the discrimination. To the contrary, the Court of Appeals upheld the challenged spending limits only after examining the record to ensure that they were viewpoint-neutral. App. 31a-34a. It also carefully considered and distinguished *Rosenberger*, 515 U.S. at 828, on that basis, noting that *Rosenberger* would compel a different result if ASUM attempted to enforce campaign rules that were not viewpoint-neutral. App. 32a-33a. Nowhere in his Petition to this Court does Petitioner challenge the determination of both the district court and the Court of Appeals that the ASUM spending limits are viewpoint neutral.[19]

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[19] In his brief to the Court of Appeals, Petitioner argued that the failure to impose spending limits on non-candidate third parties constituted viewpoint discrimination. However, there is no evidence suggesting that the failure to limit independent spending is the result of a desire to discriminate against a particular viewpoint, or that third parties as a group seek to advance specific viewpoints different from the range of viewpoints advanced by candidates. Indeed, the only record evidence on the issue establishes at most one instance of third-party spending related to a student campaign, and thus it is unremarkable that the spending restrictions have not been extended to noncandidates. *See* Statement of Facts, *supra*, at n. 10. In any event, distinctions based on status or speaker identity are not considered viewpoint discrimination. *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 49-51 (1983);

(Continued on following page)

For these reasons, there is no merit to the suggestion that the decision below conflicts with *Morse*, nor that vacatur and remand are needed to allow the Court of Appeals to consider the impact of *Morse*.

3. Petitioner also errs in arguing that the decision below conflicts with *Widmar v. Vincent*, 454 U.S 263 (1981), by declining to treat student government elections as a designated public forum to which strict scrutiny applies. *See* Petition at 26-28. *Widmar* (which does not even use the term "designated public forum") struck down a university policy of excluding student religious groups from meeting on campus, where the university routinely allowed various non-religious groups to meet on campus. This Court emphasized that its holding was based on the university's selective exclusion of disfavored groups from a forum it otherwise made generally available to the public, 454 U.S. at 269, a factual scenario not present here. *Widmar* also cautioned that its decision should not be read to undermine the traditional deference afforded to a university's academic judgments concerning the best means to foster its educational mission. 454 U.S. at 276-277. *See also id.* at 277 ("A university has the "right to exclude even First Amendment activities that violate reasonable campus

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see also App. 37a-38a. Moreover, even in the context of elections for public office, a "statute is not invalid under the Constitution because it might have gone farther than it did." *Buckley*, 424 U.S. at 105 (citations and internal quotations omitted).

rules or substantially interfere with the opportunity of other students to obtain an education.").

Here, ASUM's spending limits for student government campaigns are applicable to all students seeking election to the ASUM Senate, and are designed to help structure a competition that allows fair access to the educational opportunities afforded by student government participation. For the reasons amply explained by the Court of Appeals, App. 26a-31a, student government elections cannot be analogized to traditional public forums such as parks and streets, or to a designated forum that the university has somehow "opened for use by the public as a place for expressive activity." *Perry*, 460 U.S. at 45. Student government elections are open only to students and, as a school-sponsored activity, are delimited by rules designed to preserve their educational character. App. 28a-31a.

Moreover, Petitioner simply ignores this Court's later decisions in *Rosenberger* and *Southworth*, which clarify that viewpoint neutrality is the touchstone for the constitutionality of regulations burdening expressive activity within the university setting. *Rosenberger*, 515 U.S. at 829-830; *Southworth*, 529 U.S. at 230, 233-234. Indeed, *Southworth* specifically notes that its viewpoint neutrality standard is consistent

with the standards of cases such as *Widmar. Id.* at 230.[20]

4. Finally, the decision below is not in conflict with that of any other circuit. Petitioner claims a conflict "in principle" with *Alabama Student Party v. Student Gov't Ass'n of the University of Alabama*, 867 F.2d 1344 (11th Cir. 1989). No conflict exists. *Alabama Student Party* rejected a First Amendment challenge to student government election rules that barred campaigning and debates for student government elections outside a specified period. 867 F.2d at 1345. The Court found that "[t]here was no evidence that the regulations were anything but viewpoint-neutral," *id.* at 1347, and that the regulations were a reasonable means of structuring competition for student government seats in light of the educational function served by student government service. *Id.* at 1345-46. The court below in this case reached the same conclusion. The mere fact that the *Alabama Student Party* decision did not specifically embrace forum analysis is immaterial, given its use of the

[20] The Respondents argued below that, even if First Amendment strict scrutiny were applicable to the university's regulations for student government elections, the spending limits satisfy strict scrutiny because they are narrowly tailored to serve the university's compelling interest in assuring access to student government participation by a diverse cross-section of students. The Court of Appeals found it unnecessary to reach this issue.

same viewpoint-neutrality and reasonableness standards employed by the court below.[21]

Similarly unavailing is Petitioner's attempt to discern a conflict with decisions from other circuits that have applied First Amendment forum analysis in contexts far removed from that of student government election campaigns. Pet. at 29-33. None of the cited cases holds that student government spending limits violate the First Amendment. An alleged discrepancy between isolated passages in opinions that apply the First Amendment in widely differing factual and doctrinal contexts does not amount to a circuit conflict that justifies this Court's intervention.

II. PETITIONER'S CLAIMS CANNOT SURVIVE A THRESHOLD REVIEW FOR MOOTNESS.

Even if the claims here otherwise warranted a grant of certiorari, this case would not be an appropriate vehicle for considering them because Petitioner's claims are unlikely to survive the necessary threshold

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[21] Indeed, the Eleventh Circuit used the terminology of forum analysis when it noted that the University "views its student government association, including the election campaigns, as a "learning laboratory," similar to the student newspaper or student yearbook," and that "student government and the campaigns associated with it do not constitute a forum generally open to the public, or a segment of the public, for communicative purposes, but rather constitute a forum reserved for its intended purpose, a supervised learning experience for students interested in politics and government." *Id.* at 1347.

inquiry into mootness. Petitioner graduated nearly three years ago and there is no prospect that he will again seek student government office at UM. *Cf. DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974) (where plaintiff would graduate before challenge to admission policy could be heard, case was moot). Petitioner cannot take advantage of the mootness exception for cases that are "capable of repetition yet evading review," because of the lack of any possibility that he will again be subjected to the complained-of constitutional violation, *see Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481 (1990), and because he did not bring his lawsuit as a class action. *Cf. U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 398-408 (1980) (mootness of named plaintiff's claim not fatal where plaintiff had filed motion to certify class action before his claim became moot).

The sole remaining basis on which Petitioner seeks to avoid a finding of mootness is his alleged continuing injury from the sanctions imposed in response to his violation of the spending limit: his censure by the ASUM Senate in 2003 and his disqualification from serving on the Senate in 2004. He alleges that the mere presence of these violations on his "record" establish a continuing injury sufficient to maintain his standing to adjudicate his constitutional claims.

Petitioner, however, submitted no evidence whatsoever to support his bare allegation that the ASUM sanctions would have continuing collateral consequences now that he has graduated from UM.

There is no allegation that the sanctions imposed by the ASUM Senate appear on his official transcript; at most, the evidence indicates that they appear in the minutes of the ASUM meetings where the votes were taken (although only the minutes from the 2004 disqualification vote are actually in the record). Petitioner submitted no evidence that any prospective employer or graduate school admissions office is likely to go beyond an examination of his official transcript to comb the minutes of ASUM meetings for student government election violations. He has not suggested any other way in which the election sanctions could conceivably affect him in the future.

The Court below, without extended discussion, simply presumed that the presence of the sanctions in ASUM records was sufficient to show continuing injury. App. 7a-11a. It cited no precedent of this Court authorizing such a presumption. It relied instead on *Hatter v. L.A. City High Sch. Dist.*, 452 F.2d 673 (9th Cir. 1971), which held that two students, one of whom had been suspended from high school and the other of whom had been reprimanded and threatened with suspension, could pursue their claims for expungement of school records even though they had graduated. It also distinguished *Students for a Conservative America v. Greenwood*, 378 F.3d 1129 *as amended in* 391 F.3d 978 (9th Cir. 2004), which had found moot a student's request for expungement of sanctions from his records because the university maintained no records of the sanction. The Court concluded that the existence of any University record was sufficient to

allow a presumption of Petitioner's continuing injury for Article III purposes. App. 10a-11a.

In the context of challenges to *criminal* convictions, this Court has created a presumption that a conviction will have continuing collateral consequences sufficient to avoid mootness of a challenge to the validity of the conviction, even after a sentence has been served. *See Sibron v. New York*, 392 U.S. 40, 55-58 (1968). The presumption suffices to preserve a criminal case from mootness unless it is shown "that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." *Id.* at 57. However, even in the criminal context, the Court has declined to extend that presumption to other violations such as parole revocation. Thus, in *Lane v. Williams*, 455 U.S. 624, 632-33 (1982), the Court declined to presume that continuing collateral consequences of parole revocation, such as a possible negative effect on employment prospects, were sufficient to prevent mootness once the additional period of incarceration had already been served. *See also Spencer v. Kemna*, 523 U.S. 1, 8-14 (1998) (following *Lane*).

Lane suggested that a parole revocation might carry little weight with an employer given that the underlying criminal conviction would remain on the ex-offender's record. *Id.* There is some analogy here, because Petitioner has never challenged the constitutionality of the reporting requirements that he violated along with the spending limits, and thus there would be no basis for expunging from ASUM minutes

the reference to his censure for that violation, even if the spending limit itself were found unconstitutional. *See* Statement of Facts, *supra*, at 10.

In sum, whether this Court would choose to extend the doctrine of *Sibron* to presume continuing effects from the disciplinary sanctions at issue here is, at best, unclear. These serious questions concerning the Court's ability to reach the merits thus provide an additional reason for denying the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 07-459

FILED
DEC 4 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

AARON FLINT, *Petitioner,*

v.

GEORGE DENNISON, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF MONTANA-MISSOULA; THE ASSOCIATED STUDENTS OF THE UNIVERSITY OF MONTANA; KYLE ENGELSON, IN HIS OFFICIAL CAPACITY AS THE ASUM ELECTIONS COMMITTEE CHAIR, ET AL, *Respondents.*

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

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Argument

In opposing this Court's review of the myriad questions raised by the lower court's analysis and decision, the University ("UM") raises two new points. First, it offers another purpose for limiting student government candidates' speech through expenditure limits, casting doubt on those relied on by the Ninth Circuit. Second, it argues that the case is moot and not saved under the expungement exception because Aaron must show that the record of his censure and removal from office as a result of the challenged law will adversely affect him.

I. UM Offers No New Legitimate Purpose for the Limits.

UM now claims that limiting student candidates' speech during student government elections is a legitimate means of "provid[ing] an opportunity for all qualified ASUM members to compete for the limited number of seats available on the ASUM Senate, and thus to access the opportunities for leadership and policy learning that Senate participation provides." Br. Opp. 18[1]. In short, UM limits student candidates' speech to ensure that speakers have what UM considers an equal chance to effectively persuade the student body.[2] This is permissible, UM contends, because

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[1]UM consistently offered this justification for the challenged limits throughout litigation in the lower courts, but it was not discussed in the Ninth Circuit's opinion.

[2]UM's concern for "students without personal or family resources to spend" and the costs of "matching funds," Br. Opp. 18, 19, are misplaced. Candidates may accept contributions from other students, *see* Br. Opp. 21 n.18, and partial matching funds are provided for only those candi-

ASUM office should be treated as a "popular, over-subscribed class." Br. Opp. 19. In UM's view, candidate speech and student government are subsumed under its educational purpose.

This Court has explained that public school students' First Amendment rights "are not automatically coextensive with the rights of adults in other settings," *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986), and that the school setting informs the government's interests in limiting student speech. *See, e.g., Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988). But public university students *are* legally adults, and "[w]ith respect to persons entitled to be there, . . . the First Amendment rights of speech and association extend to the campuses of state universities." *Widmar v. Vincent*, 454 U.S. 263, 268-69 (1981). A university's educational mission "does not exempt its actions from constitutional scrutiny." *Id.* at 268.

UM argues that the university setting creates educational interests that uniquely *subsume* First Amendment interests. In no other context are such restrictions constitutionally permissible. Limiting speech to equalize its effect on listeners is illegitimate, whether offered in a campaign, a government-created forum, or on campus generally.[3] In no non-university

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dates who request it. ASUM Bylaws Article V § 2(G)(4). ASUM could permissibly require these candidates to limit their expenditures. *See Buckley v. Valeo*, 424 U.S.1, 57 n.65 (1976).

[3]It is well-settled that such an interest is illegitimate support for restricting candidates' speech in elections to public office. *See Buckley*, 424 U.S. at 48-49 (restricting speech "in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."); *id.* at 56-57

setting could expenditures for speech during elections be limited, and in no non-election *university context* could students' political and social advocacy be so limited.[4] UM's position therefore depends on the view

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(equalizing candidates' spending not justified by an interest in limiting the total scope of a campaign, and limiting expenditures "might . . . handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign."). Access to even a nonpublic forum is properly granted or denied based on the conditions that government has placed on the use of its property, not equalizing the perceived effect of the resulting speech. *See Perry Education Assoc. v. Perry Local Educators' Assoc.*, 460 U.S. 37, 49 (1983). And limiting on-campus, independent student political and social advocacy must be based on well-founded fears of material and substantial disruption of "the work and discipline of the school," a fear that UM does not even allege. *Tinker v. Des Moines Ind. Comm. School Dist.*, 393 U.S. 503, 513 (1969).

[4]UM apparently recognizes this, as it does not limit students' First Amendment rights in any other university context. *See* Montana Board of Regents of Higher Education Board Policy ("Board Policy") 506.2(3), ASUM Constitution Art. 9, § 1 and ASUM Bylaws Art. IV, § 8(C) (Publications Board "shall oversee the general operations of ASUM-funded publications, without infringing on First Amendment rights."); ASUM Constitution Art. 9, § 3 (Broadcast Board "oversee[s] student radio and broadcast operations without infringing upon first amendment rights"); ASUM Constitution Art. 8, § 5, (all funds shall be managed in accordance with state and federal laws, and Board of Regents policy); ASUM Fiscal Policy 9.1.3 ("Notwithstanding any other provision of these Student Activity Fee funding guidelines, no student news, information, opinion, entertainment, academic or media communication shall solely be deemed ineligible for funding because of the ideas

that student government and its elections are so distinct from these contexts that it is completely subsumed under its educational mission. However, the distinctions UM offers between student government office and "public office," Br. Op. 16, do not justify treating elections to ASUM government as a means of access to a "sought-after history class." Br. Op. 7.

While ASUM and its elections may entail educational benefits, so does holding public office and competing in elections to public office. ASUM officeholders gain useful experience while wielding sovereign power, as does as any public officeholder. The presence of nonvoting faculty members, training in parliamentary procedure, and the "practical deliberative and legislative experience" of ASUM government service, Br. Opp. 3, do not distinguish student government as primarily educational. Participation in federal and state government includes such training and offers similar benefits.

Most important, ASUM government was created by the State of Montana, not UM. The Board of Regents, in which the Montana Constitution vests "government and control" over the entire University of Montana system,[5] affirmatively recognizes ASUM as the legitimate body politic of students and directs that it "shall

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or viewpoints expressed or advocated by the recognized organization.").

[5]The Board of Regents is "a constitutionally independent entity," made directly sovereign over UM by Constitutional Convention in 1972. *See* David Aronofsky, *Voters Wisely Reject Proposed Constitutional Amendment 30 to Eliminate the Montana Board of Regents*, 58 Mont. L. Rev. 333, 363 (1997). Montana places all aspects of the university system under the Board. So UM's view of ASUM is wrong.

be constituted and operated according to [Board policies]." Board Policy 506.2. Board Policy 506.2(1) requires ASUM's constitution, which establishes ASUM government. ASUM government offices are public offices.[6]

The faculty advisor's declaration that "ASUM has been part of the UM educational mission" since its inception, Br. Opp. 2, does not negate this. *See also* App. 48a-50a (noting similar claims). The view of a faculty advisor does not affect ASUM's legal status, and faculty and administration have a tendency to define a university's educational mission to justify control over students' speech. *See Morse v. Frederick*, 127 S. Ct. 2618, 2637 (2007) (Alito and Kennedy, JJ., concurring).

The ASUM Constitution's declaration of its primary responsibility as "serv[ing] as an advocate for the general welfare of the students," ASUM Const. Art. 2, §1, does not negate the lawmaking authority granted elsewhere in that same document.[7] *See* ASUM Const.

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[6]According to *Black's Law Dictionary*, the elements establishing a public office are:

> position must be created by constitution, legislature, or through authority conferred by legislature, portion of sovereign power of government must be delegated to position, duties and powers must be defined, directly or impliedly, by legislature or through legislative authority, duties must be performed independently without control of superior power other than law, and position must have some permanency and continuity.

Black's Law Dictionary 1107 (5th ed. 1979).

[7]Indeed, the General Welfare Clause of the United States Constitution is the *source* of much federal regulation.

Art. 2, § 3. Students cannot avoid ASUM government as they might avoid an optional class. Any student enrolled half-time is assessed an activity fee and is thereby an ASUM member and subject to ASUM government. ASUM funds and oversees university student groups, substantively affecting their rights and duties. The activity fees ASUM disburses are public funds.

If ASUM government is merely an educational tool subsumed under UM's educational mission, it is difficult to reason why this Court has held that the First Amendment requires that student government use student activity fees to fund student groups' activities in a viewpoint-neutral way. *See Board of Regents of the University of Wisconsin v. Southworth*, 529 U.S. 217 (2000). The structure and function of ASUM and its government is almost identical to that of the Associated Students at Madison ("ASM"), and this Court did not consider ASM to be primarily an educational tool subsumed under the University of Wisconsin's educational mission, and it did not hesitate to consider ASM's decisions as law subject to the full force of the First Amendment.[8] UM fails to justify

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See generally Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 Kan. L. Rev. 1 (2003).

[8] As this Court said:

> The responsibility for governing the University of Wisconsin System is vested by law with the board of regents. § 36.09(1). The same law empowers the students to share in aspects of the University's governance. One of those functions is to administer the student activities fee program. By statute the "[s]tudents in consultation with the chancellor and

treating ASUM government and its elections as subject to its educational interests.

II. UM Casts Doubt on the Validity of its Interests in the Limits.

The University has offered an "equalizing speech" justification for the limits that was not considered by the lower court or addressed in Aaron's Petition. Br. Opp. 18. If this Court considers this new justification, it should also consider whether the limits are underinclusive, casting doubt on whether they were, in fact, adopted for the purposes relied on by the lower court. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002) ("*White*").

Where considerable First Amendment freedoms are at stake, a state must "demonstrate its commitment to advancing [its] interest by applying its prohibition evenhandedly." *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989). *See also City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994). If the education of student leaders is served by "requir[ing] student candidates to focus on desirable qualities such as the art of persuasion, public

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> subject to the final confirmation of the board [of regents] shall have the responsibility for the disposition of those student fees which constitute substantial support for campus student activities." § 36.09(5). The students do so, in large measure, through their student government, called the Associated Students of Madison (ASM), and various ASM subcommittees. The program the University maintains to support the extracurricular activities undertaken by many of its student organizations is the subject of the present controversy.

Id. at 222.

speaking, and answering questions face-to-face with one's potential constituents," App. 36a, then UM should–but does not–limit the speech of student candidates for office in other student organizations.[9]

For example, student candidates running for office in the American Humanics Student Association (AHSA), one of many ASUM "Member Organizations," self-described as "[d]edicated to enriching professional leadership potential in the field of non-profit youth and human service administration,"[10] are not subject to any limit on their speech. Yet persuasion, public speaking and answering questions in person are as desirable in AHSA student candidates as ASUM student candidates. Likewise, UM imposes no expenditure limits on Member Organization elections to ensure that a "wealthy student . . . [cannot] buy a first shot" at the educational opportunity of leadership in organizations like the AHSA. Br. Opp. 7.

The spending limits are also "woefully underinclusive," *White*, 536 U.S. at 780, if the "'pri-

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[9]According to the ASUM Constitution, Article 6, § 4(a), "member groups shall adhere to the ASUM Constitution, Bylaws, and Fiscal Policy," and ASUM's Board on Member Organizations "shall monitor compliance of ASUM member groups with ASUM Bylaws, Constitution, and policies." *Id.* Article 6, § 1; *See also id.* § 4(b) (member groups to "define goals and to adhere to practices described in their constitutions or statements of process, *as approved by the Board on Member Organizations* (emphasis added)). But the expenditure limits apply only to candidates for office in ASUM, App. 70a, where the size of the electorate and the number of issues raised militate against limiting candidates' expenditures.

[10]*See* http://www.umt.edu/asum /stg_ac.htm,

mary intent' of imposing them is 'to prevent student government's being diverted by interests other than ones educational.'" App. 35a-36a (citation omitted). For example, as Respondent Gail Price has noted, "ASUM officers and Senate members engage in lobbying the state legislature on a variety of issues." Record 29. Yet there are no limits on spending guarding ASUM's educational purposes from being diverted to lobbying. Likewise, ASUM officers and Senate members "having greater financial resources," Br. Opp. 18, are not made to limit their political and social advocacy from the bully pulpits supplied by their positions after election, and "the notion that the special context of electioneering justifies an abridgment of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head." *White*, 536 U.S. at 781. The limits fall far short of protecting any interests offered by UM.

III. This Controversy Is Not Moot.

The University claims that Aaron's claims are moot and not saved by the expungement exception because a record of "negative information derived from allegedly unconstitutional school regulations," App. 9a, does not suffice to show "continuing injury for Article III purposes." Br. Opp. 32. The University admits that these records exist, Br. Opp. 9-10, *see also* App. 11a n.3, but argues that "no precedent of this Court authoriz[es] . . . [the] presumption" that their existence effects an ongoing injury.

The University's argument is essentially that, because this Court has never said that such a presumption is proper in a civil case, it is not proper, and the Ninth Circuit should not have relied on its own precedents in finding ongoing injury here. But the Ninth Circuit is not alone in its position. Requiring a

plaintiff seeking expungement in a civil case to present evidence of an ongoing injury from adverse records would also conflict with the law of at least four other Circuits.[11]

Moreover, UM concludes that, because this Court has held that criminal convictions are presumed to effect an ongoing injury, but has not held so for civil records, a plaintiff must show evidence of ongoing injury from the civil records to avoid mootness. Br. Opp. 32-33.[12] This Court has not had occasion to address whether retaining adverse university student records is an ongoing injury, but in *Church of Scientology of California v. U.S.*, it held that the plaintiff's claims were not moot so long as the government retained copies of records that the church claimed were unlawfully acquired. 506 U.S. 9 (1992). The Court

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[11] *See, e.g., Doe v. Pulaski County Special School Dist.*, 306 F.3d 616, 621 (8th Cir. 2002) (pupil) (en banc) (*citing Kerr v. Farrey*, 95 F.3d 472, 476 (7th Cir.1996)); *Sun Oil Co. of Pa. v. N.L.R.B.*, 576 F.2d 553, 558 n.3 (3d Cir. 1978) (employer) (*citing Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125 (1974)), *abrogation on other grounds recognized by CPS Chem. Co. v. N.L.R.B.*, 160 F.3d 150, 153 (3d Cir. 1998); *Sullivan v. Murphy*, 478 F.2d 938, 961 (D.C. Cir.) (Vietnam-era demonstrators), *cert. denied*, 414 U.S. 880 (1973); *see also Kansans for Life, Inc. v. Gaede*, 38 F. Supp. 2d 928, 932 (D. Kan. 1999) (group engaging in issue advocacy) (collecting cases).

[12] UM casts *Lane v. Williams*, 455 U.S. 624 (1982), as suggesting the presumption should not be applied here. But there, the plaintiffs had not claimed that parole was wrongfully revoked, or asked that their records be expunged, and the relief sought–correction of a sentence–could not provide effective relief, as it would leave the record intact. *Id.* at 632-33, n.14.

noted that "[t]axpayers have an *obvious* possessory interest in their records" and a constitutionally protected right to privacy injured by government's retaining even copies of the records. *Id.* at 13 (emphasis added). The only evidence of ongoing injury noted was the church's vigor in seeking return of the records. *Id.*

Finally, Aaron need not challenge the reporting requirements for this Court to grant effective relief. If the expenditure limits are found unconstitutional, "declaratory relief would require the University to expunge any and all records of Flint's censure and Senate seat denial," App. 10a, the relief Aaron seeks.

Conclusion

This Court should grant Aaron's petition and vacate the Ninth Circuit's decision and remand the case for reconsideration in light of *Morse*, 127 S. Ct. 2618 or, in the alternative, this Court should grant certiorari and set the case for briefing on the merits.

Respectfully submitted,

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